Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, ET AL.,

Petitioners,

—v.—

JOHN L. MCMILLAN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Docket 00055

56-71

SIRICA, J.

JOHN DOE, ET AL

vs.

JOHN L. MCMILLAN, ET AL

DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES

Jury Demanded

Civil Docket 00056

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDING
1971	
	Deposit for cost by Without prepayment of costs. Robinson, J.
Jan. 8	Complaint, appearance; jury demand; filed #46 serv. 1-28-71
Jan. 8	Summons, copies (34) and copies (34) of Complaint issued Defts. #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 46 & #47; #1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 serv. 1-19; #3 NF 1-19 (deceased); #17 serv. 1-20; #18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31sv. 1-19; #47 serv. 1-19

DATE	PROCEEDING
1971	
Jan. 8	Summons, copies (14) & copies (14) of Complaint issued Defts. #32, 33, #34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 & #45; all but #41 serv. 1-18
Jan. 8	Order denying Plaintiffs' motion to proceed under Fictitious Names and setting for hearing in Motions II; Clerk to notify U.S. Attorney forthwith. (signed 1/7/71) McGuire, J.
Jan. 8	Motion of pltffs. for leave to proceed under fictitious names and for immediate consideration of this motion; P & A's. filed
Jan. 8	Motion of pltffs. for leave to proceed without prepayment of costs or fees; P & A's. filed
Jan. 8	Order granting pltffs' motion to proceed in Fictitious Names. (N) Robinson, J.
Jan. 8	Order granting pltffs' motion to proceed without prepayment of costs. (N) Robinson, J.
Jan. 8	Motion of pltffs' for Temporary Restraining Order; Memorandum. filed
*Jan. 8	Motion of pltffs' for Preliminary Injunction; cert. of ser. filed
*Jan. 11	Order denying pltfs. application for Temporary Restraining Order and dismissing complaint. (N) Sirica, J.
Jan. 12	Notice of appeal in forma pauperis from order of 1-11-71 submitted to Judge Sirica; copies mailed to Joseph Hannon and Thomas Nedrich. filed
Jan. 12	Leave to proceed on appeal without prepayment of costs, granted. Sirica, J.
Jan. 12	Transcript of proceedings, 1-8-71, pages 1-32; Nicholas Sokal, Reporter. (Court's copy) filed
Jan. 12	Exhibit "A" by pltfs. filed

DATE	PROCEEDING
1971	
Jan. 12	Exhibit "A" by defts. filed
*Jan. 11	Application of pltf. for transcript of hearing for Temporary Restraining Order at the expense of the United States. filed
*Jan. 8	Application of pltfs. for a Temporary Restraining Order heard, denied, and complaint dismissed. (OTBP) (Reporter N. Sokal) Sirica, J.
Jan. 11	Order denying application of pltfs for a temporary restraining order and dismissing complaint as to all defts. (N) Sirica, J.
Jan. 12	Record on Appeal delivered to USCA; In Forma Pauperis (Clerk's fee $1.40)
Jan. 12	Receipt from USCA for Original Record. filed
Jan. 12	Authorization for transcript at expense of U. S. (N) Sirica, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 56-71

JOHN DOE, BY HIS GUARDIAN MARY DOE; RICHARD ROE, BY HIS GUARDIAN MARY ROE; on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

JOHN L. MCMILLAN, THOMAS G. ABERNETHY, WILLIAM L. DAWSON, JOHN DOWDY, CHARLES C. DIGGS, G. ELLIOTT HAGAN, DON FUQUA, DONALD M. FRASER, BROCK ADAMS, ANDREW JACOBS, PETER N. KYROS, WILLIAM L. HUNGATE, EARLE CABELL, RAY BLANTON, ANCHER NELSEN, WILLIAM L. SPRINGER, ALVIN E. O'KONSKI, WILLIAM H. HARSHA, JOEL T. BROYHILL, LARRY WINN, GILBERT GUDE, LAWRENCE J. HOGAN, VERNON W. THOMSON, HENRY P. SMITH III, EARL F. LANDGREBE, as chairman and members of the Committee of the District of Columbia of the United States House of Representatives, 1310 Longworth House Office Building, Washington, D.C. 20515:

JAMES T. CLARK, clerk, CLAYTON S. GASQUE, staff director; HAYDEN S. GARBER, counsel; Committee on the District of Columbia of the United States House of Representative, 1310 Longworth House Office Building, Washington, D.C. 20515:

PAUL YATES LITTLE, individually, and as consultant, Committee on the District of Columbia of the United States House of Representatives, 1310 Longworth House Office Building, Washington, D.C. 20515:

ROBERT E. KING, Superintendent of Documents, and NICHOLAS A. SPENCE, Public Printer, United States Government Printing Office, North Capitol and H Streets, Washington, D.C. 20401:

ANITA FORD ALLEN, President Board of Education of the District of Columbia, Presidential Building 415 Twelfth Street, N.W., Washington, D.C. 20004:

JAMES E. COATES, MURIEL M. ALEXANDER, CHARLES I. CASSELL, EDWARD L. HANCOCK, NELSON C. ROOTS, ALBERT A. ROSENFIELD, MARTHA A. SWAIM, MATTIE G. TAYLOR, BARDYL R. TIRANA, EVIE M. WASHINGTON, Members of the Board of Education of the District of Columbia, Presidential Building, 415 Twelfth Street, N.W., Washington, D.C. 20004:

HUGH SCOTT, Superintendent Public Schools of the District of Columbia, Presidential Building, 415 Twelfth Street, N.W., Washington, D.C. 20004:

OTHIELLO SAVOID, Individually and as Principal of Jefferson Junior High School, Eighth Street and H Street, S.W., Washington, D.C. 20024:

VIOLA M. IRVEN, Individually and as Teacher at Jefferson Junior High School, Eighth and H Streets, S.W., Washington, D.C. 20024:

LOUIS E. MARTIN, Individually and as Investigator, Committee on the District of Columbia of the United States House of Representatives 8244 Pennsylvania Avenue, S.E., Washington, D.C. 20020:

UNITED STATES OF AMERICA, U.S. Attorney General, Department of Justice, Washington, D.C., DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES—Filed January 8, 1971

I. *Preliminary Statement and Jurisdiction*

(1) This is a class action for declaratory judgment and injunctive relief to enjoin defendants from publishing certain information regarding school children at the Jefferson Junior High School and other District of Columbia Schools, which violates their statutory, regulatory, administrative, common law, and Constitutional rights and for damages for tortious violation of plaintiffs' and plaintiffs' children's right to privacy.

(2) As a result of publication of information regarding members of the class, plaintiffs and plaintiffs' children have suffered and will continue to suffer irreparable

injury. There exists between plaintiffs and defendants an actual controversy justiciable in character, in respect to which this Court can render an adequate and effective judgment which will advance the interests of justice. The relief plaintiffs seek is a declaratory judgment that certain actions by defendants are unlawful, for unjunctive relief to compel defendants to refrain from violating plaintiffs' rights, and for damages. This suit raises questions under the Constitution and laws of the United States and the amount in controversy, exclusive of interests and costs, exceeds $10,000. This Court has jurisdiction pursuant to 11 D.C. Code § 521; 1 D.C. Code § 1501 et. seq. 28 U.S.C. § 1331, 1343, 1346, 1361, 2201, 2202, and 42 U.S.C. § 1983; 28 U.S.C. 1651.

II. *Plaintiffs—Class Action*

Plaintiffs are citizens of the United States and residents of the District of Columbia. Plaintiffs' children have been referred to by name in the Report of the Committee on the District of Columbia of the U.S. House of Representatives entitled "Investigation and Study of the Public School System of the District of Columbia" (hereinafter, the Report). Plaintiffs sue on their own behalf, on behalf of their minor children, and on behalf of a class composed of all students in the District of Columbia schools and their parents. Upon information and belief, all plaintiffs are Black and are of low or moderate income. Plaintiffs bring this action pursuant to Rule 23 of the Federal Procedure on behalf of themselves an all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact comomn to the class, the claims of the representative parties will fairly and adequately protect the interest of the class; the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with regard to individual members of the class and would as a practical matter be dispositive of the similar claims of other members not parties to the adjudication; the questions of law or fact are common to the members;

and a class action is superior to other available methods to the fair and efficient adjudication of the controversy.

III. *Defendants*

(4) The defendants in this action are:

(a) John L. McMillan, who, as Chairman of the Committee on the District of Columbia of the United States House of Representatives, (hereinafter, the Committee), is responsible for all activities of the committee and its staff.

(b) Thomas G. Abernethy, William L. Dawson, John Dowdy, Charles C. Diggs, Jr., G. Elliott Hagan, Don Fuqua, Donald M. Fraser, Brock Adams, Andrew Jacobs, Peter N. Kyros, William L. Hungate, Earle Cabell, Ray Blanton, Ancher Nelsen, William L. Springer, Alvin E. O'Konski, William H. Harsha, Joel T. Broyhill, Larry Winn, Gilbert Gude, Lawrence J. Hogan, Vernon W. Thompson, Henry P. Smith, Earl F. Landgrebe, who are members of the committee.

(c) James T. Clark, who, as Clerk of the Committee, is in charge of its staff operations.

(d) Clayton S. Gasque, who, as Staff Director of the Committee, is also responsible for its operations.

(e) Hayden S. Garber, who, as Counsel to the Committee, is responsible for legal advice to the Committee.

(f) Paul Yates Little, who, as consultant to the Committee, is responsible for the investigation which led to the report complained of herein and prepared said report.

(g) Louis Martin, who, as a sargent of the D.C. Metropolitan Police Department, and, as an investigator of the Committee, conducted the investigations which were used in the report complained of herein.

(h) Robert E. King, who, as Superintent of Documents, is responsible for the printing and distribution of Congressional reports.

(i) Nicholas A. Spence, who, as Public Printer, is responsible for the printing and distribution of Congressional reports.

(j) Anita Ford Allen, who, as President of the Board of Education of the District of Columbia, is responsible for the operations of said Board.

(k) James C. Coates, Muriel M. Alexander, Charles I. Cassell, Edward Hancock, Nelson C. Roots, Albert Rosenfield, Martha S. Swaim, Mattie G. Taylor, Bardyl R. Tirana and Evie M. Washington, who, as members of the Board of Education of the District of Columbia, participate in the decisions of the School Board establishing school policy and governing the conduct of all employees of the school system.

(l) Hugh Scott, who, as Superintendent of the public schools of the District of Columbia is responsivle for the operations of such schools and for the conduct of school employees.

(m) Othiello Savoid, who, as Principal of Jefferson Junior High School, is responsible for the supervision of all teachers and for the maintenance and preservation of records of said school, and for certain actions complained of herein.

(n) Viola M. Irven, who, as a teacher at Jefferson Junior High School, is responsible for certain actions complained of herein.

IV. *Allegations.*

(5) On or about December 16, 1970, defendant members of the United States House of Representatives, authorized to be published and did publish a report entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 91681). Said defendants also caused the report to be distributed to members of the public.

(6) The report included: (1) copies of attendance records of Jefferson Junior High School for several days during 1970 (pages 213 to 223); these lists included the names of numerous students at Jefferson Junior High School whose parents are plaintiffs herein; (2) various test papers carrying the names and grades of students at the Jefferson Junior High School whose parents are plaintiffs herein (pages 224 to 252); and (3) various letters and memoranda regarding alleged disciplinary problems of students at the Jefferson Junior High School, whose parents are plaintiffs herein (pages 256 to 258).

(7) Upon information and belief, on or about April 14, 1970, defendant Savoid gave defendant Martin copies of the disciplinary letters printed in the report and other materials and on or about May 6, 1970, defendant Irven gave defendant Martin copies of the attendance lists, the school test papers also printed in the report and other materials. Upon information and belief, defendants Savoid and Irven were not authorized to release these documents.

(8) Upon information and belief, defendant Martin delivered copies of the said attendance lists, disciplinary letters, test papers and other materials bearing the names of and information about the plaintiffs and their children to defendant Little, who, as a contract consultant to the Committee, was responsible for the preparation of the report. Defendant Little then caused the copies of the papers referred to above to be included in a draft of the report; defendant members of the United States House of Representatives approved said report for publication; defendants Harrison and Buckley and others acting under their supervision, printed the report and caused the report to be distributed to the public; distribution of the report continues to the present.

(9) Upon information and belief, defendant members of the Board of Education and defendant Scott have failed to promulgate and enforce for the District of Columbia School System rules and regulations governing the confidentiality of such school papers as attendance lists, disciplinary letters and memoranda, school test papers and other such school documents, with the result that, depending upon the uncontrolled exercise of discretion by individual members of the school administrative staff and teachers, information regarding students of the District of Columbia schools is, or may be, distributed to members of the public in violation of the students' constitutional rights and their right of privacy.

V. *Causes of Action*

(10) By disclosing, disseminating and publishing the information complained of herein, defendants violated

plaintiffs' rights to confidentiality of information regarding their children and the parent-teacher privilege. Said disclosure and publication has had and will continue to have an immediate and serious detrimental impact upon the psychological make-up and education of the plaintiffs' children, causing said children to lose trust in their teachers and their schools and creating, through a nation-wide disclosure of adverse information about them, a chilling effect upon the exercise of plaintiffs' children's rights to freedom of speech and association. Said disclosure of information regarding plaintiffs' children by Congressional defendants was wholly devoid of any valid legislative purpose.

(11) Plaintiffs incorporate the foregoing allegations contained in paragraphs one through nine and allege that defendants' publication of attendance or absentee lists bearing plaintiffs' children's names, letters and memoranda bearing plaintiffs' names and plaintiff's children's names regarding alleged disciplinary problems caused by them, and test papers bearing their children's names and grades, has caused and will continue to cause grave damage to plaintiffs' and their children's mental and physical health, their reputations and good name, and their children's future careers so as to damage their education and future employment.

(12) By their conduct, defendants have unjustly caused plaintiffs and their children, to suffer grave damage to their mental and physical health, their reputations and good name, and their future careers; defendants committed the above acts intentionally and with knowledge that the publication of the information referred to above would have an adverse impact upon the mental and physical health, reputations, and careers of the plaintiffs and their families.

(13) By their conduct leading to the publication of the items referred to above, defendants Scott, Savoid and Irven violated Section 6 of Chapter XVI of the Rules for the Public Schools of the District of Columbia by the Board of Education for the District of Columbia governing disclosure of school lists and all defendants violated the plaintiffs' and their children's Constitutional rights

and common law rights to privacy and the confidentiality of their school papers; defendants acted willfully, intentionally, and maliciously, with utter disregard for plaintiffs' and their children's rights and with the intention to cause them mental anguish and to damage their reputations and good name and future careers; at no time did plaintiffs or their children authorize or consent to said publications, directly or indirectly.

(14) By their conduct leading to the publication of the items referred to above, defendants Savoid, Irven, Martin, and Little have violated the Civil Rights of the plaintiffs and their children, as guaranteed by the Civil Rights Act of 1871.

(15) Upon information and belief, unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students of the District of Columbia schools in a tortuous and illegal manner and will, thereby, cause direct and material irreparable injury to plaintiffs' and their children's mental and physical health, reputation, good name, property, future careers, and relations with other students and their teachers.

(16) Plaintiffs incorporate the foregoing allegations contained in paragraphs one through fourteen and allege that defendants' conduct, as herein alleged, caused them and will continue to cause them to suffer grievious consequences to their mental and physical health, their reputations and good name, and future careers, and, thereby damaged each plaintiff in the amount of $50,000.

(17) Plaintiffs have no remedy as practical and efficient to the ends of justice as injunctive relief, and, unless such relief is granted plaintiffs will suffer irreparable injury.

VI. *Prayer for Relief*

WHEREFORE, plaintiffs respectfully pray that this honorable Court:

1. Declare, adjudge and hold that the publication of the matters complained of above violated plaintiffs' and their children's statutory, regulatory, administrative, common law, and Constitutional rights.

2. Enter an order enjoining the defendants from further publication, dissemination and distribution of said report, containing the information complained of above, and further order said defendants to call back or otherwise obtain copies of previously issued report, to such extent as may be practical, so that the matters complained of may be deleted.

3. Enter an order prohibiting any future disclosure or publication of confidential information regarding attendance or absentee records, disciplinary reports and letters, school test papers and other matters pertaining to, and specifically mentioning plaintiffs and their children by name.

4. Enjoin the defendant members of the District of Columbia School Board to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia and, *pendente lite*, order the defendant members of the School Board and defendants Scott, Savoid and Irven from disclosing any further information which identifies by name any student of the Jefferson Junior High School, and any other students of the District of Columbia.

5. Award judgment for the plaintiffs individually in the sum of $50,000 as compensatory damages and award judgment for the plaintiffs individually in the sum of $50,000 as punitive damages.

6. Grant such other and further relief as the Court deems just and proper under the circumstances.

PLAINTIFFS DEMAND TRIAL BY JURY.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

January 6, 1971

OF COUNSEL:

Jeffrey Fornaciari*
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

CERTIFICATE OF SERVICE

I hereby certify that at approximately 4:00 p.m., Wednesday, January 6, 1971, I telephoned and spoke with Joseph Hannon, Assistant U. S. Attorney, U. S. Courthouse and described the nature of the complaint herein and our intention to seek a temporary restraining order on Thursday, January 7, 1971. Mr. Hannon indicated that he was not authorized to represent the named defendants and that notice to him was not notice to any defendant.

/s/ Dennis A. Dutterer
DENNIS A. DUTTERER
Suite 509
1145 19th Street, NW
Washington, D.C. 20036
833-1700
Attorney for Plaintiffs

* A member of the Bar of the State of New Mexico.

I hereby certify that at approximately 9:15 a.m., on Thursday, January 7, 1971, I telephoned the office of John A. Earnest, Esquire, Assistant Corporation Counsel, D.C., District Building and on learning that he was in conference was transferred to and spoke with his chief assistant, Lymann Umstead, Esquire, Assistant Corporation Counsel, D.C.; I explained the nature of the complaint to Mr. Umstead and indicated that we would file the complaint and seek a temporary restraining order in the late morning, Thursday, January 7, 1971; I caused a copy of the complaint and other papers to be delivered to the Office of Mr. Earnest, Room 310, District Building, at approximately 11:00 a.m., on Thursday, January 7, 1971.

I further certify that at approximately 9:45 a.m., on Thursday, January 7, 1971, I telephoned and spoke with Hayden Garber, Esquire, Counsel of the House Committee on the District of Columbia, Longworth Building, and explained the nature of the complaint, the relief sought against the Congressional Defendants and our intention to seek a temporary restraining order on Thursday, January 7, 1971; Mr. Garber stated that he was not authorized to represent the Committee members in the absence of instructions from the Chairman.

I further certify that at approximately 10:00 a.m., on Thursday, January 7, 1971, I called the office of the Honorable John L. McMillan in Florence, South Carolina, and spoke with Mr. McMillan's secretary, explaining the nature of the complaint, the relief sought against the Congressional Defendants and our intention to seek a temporary restraining order on Thursday, January 1, 1971; I suggested to Mr. McMillan's secretary that if the Congressman wished to be represented at any Court hearing herein that he might wish to call the U.S. Attorney's Office in Washington, D.C.

I further certify that at approximately 10:15 a.m., I called and spoke with Joseph Hannon, Esquire, Assistant U. S. Attorney and repeated our intention to seek a temporary restraining order on Thursday, January 7, 1971 and I further indicated that I had called Mr. Garber and Congressman McMillian's office in Florence, South

Carolina. Mr. Hannon stated that he was not authorized to represent any of the defendants; I caused a courtsey copy of the complaint and supporting papers to be hand delivered to Mr. Hannon's office, Room 2439, U. S. Court House at approximately 11:30 a.m., Thursday, January 7, 1971.

/s/ J. Kirkwood White
Suite 509
1145 19th Street, NW
Washington, D.C. 20036
833-1700
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER—Filed January 8, 1971

Plaintiffs respectfully move the Court for a temporary restraining order enjoining defendants and their agents, servants, employees and attorneys, and any persons acting in active concert with them, from directly or indirectly (a) seeking or permitting further distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" so long as said report includes the names of Plaintiffs' children and other school children of the Jefferson Junior High School and other schools of the District of Columbia on attendance sheets, letters and other memoranda regarding disciplinary matters and test papers and other confidential information; and (b) from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia. Plaintiffs respectfully request that the temporary restraining order specifically include all Defendants including the named members of Congress except to the extent that Article I, Section 6 of the United States Constitution confers immunity to said Members with respect to their speeches on the floor of the House of Representatives and extension of their remarks in the Congressional Record.

The grounds for this Motion are set forth in the Memorandum filed herewith in support of this Motion.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
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OF COUNSEL:

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(202) 833-1700

* A member of the Bar of the State of New Mexico.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION— Filed January 8, 1971

Plaintiffs respectfully move the Court for a preliminary injunction enjoining Defendants and their agents, servants, employees and attorneys, and any persons acting in active concert with them, from directly or indirectly (a) seeking or permitting further distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" so long as said report includes the names of Plaintiffs' children and other school children of the Jefferson Junior High School and other schools of the District of Columbia on attendance sheets, letters and other memoranda regarding disciplinary matters and test papers and other confidential information; and (b) from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia. Plaintiffs respectfully request that the preliminary injunction specifically include all Defendants including the named members of Congress except to the extent that Article I, Section 6 of the United States Constitution confers immunity to said Members with respect to their speeches on the floor of the House of Representatives and extension of their remarks in the Congressional Record.

The grounds for this Motion are set forth in the Memorandum filed herewith in support of this Motion.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
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OF COUNSEL:

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(202) 833-1700

* A member of the Bar of the State of New Mexico.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 56-71

JOHN DOE, BY HIS GUARDIAN MARY DOE, ET AL,
PLAINTIFFS

vs

JOHN L. MCMILLAN, ET AL, DEFENDANTS

Friday, January 8, 1971

The above-entitled cause came on for hearing on Motion for Temporary Restraining Order, before THE HONORABLE JOHN J. SIRICA, at 4:30 pm.

APPEARANCES:

On Behalf of the Plaintiffs:

J. KIRKWOOD WHITE, Esq.
DENNIS DUTTERER, Esq.

On Behalf of the Defendants:

JOSEPH M. HANNON, Ass't. U.S. Attorney
THOMAS NEDRICH, Esq., Ass't. Corp. Counsel,
District of Columbia

[fol. 2]

PROCEEDINGS

THE COURT: Is counsel for the government present?

MR. HANNON: Your Honor, I note the United States of America is named a party defendant in this action. Up until now I had not noticed that, I thought I was here merely as amicus and am now here in the capacity as representing the United States.

THE COURT: Anyone else representing the parties? I think the Corporation Counsel knew about this case, didn't he?

MR. WHITE: Yes, Your Honor.

THE COURT: We waited since 3:00 o'clock for him, haven't we? I think we ought to proceed.

MR. WHITE: Thank you, Your Honor. I appreciate your scheduling this this afternoon.

Your Honor, this is plaintiffs' application for a temporary restraining order. The matter complained of in the suit and one of the matters sought to be restrained is a Report of the House District Committee which includes in it three categories of material which we submit in the complaint injure the plaintiffs and continues to injure them.

First of all, the report is entitled Investigation and Study of the Public School System of the District of Columbia.

In the report—and I have a copy of the report for the Court (handed to the Court)—the page numbers are [fol. 3] referred to in the complaint.

THE COURT: This report, I think, is a result of a hearing conducted by this committee involved in this case?

MR. WHITE: That is correct, Your Honor.

THE COURT: Testimony was taken in open session?

MR. WHITE: The testimony was taken in open session. As a matter of fact, however, the materials that we complain of which run from page 213 through to page 252, and on page 256 through page 258 were obtained by the committee by an investigation.

THE COURT: What was the purpose of the investigation?

MR. WHITE: Your Honor, the purpose as stated in the text of the report and in the letter of transmittal from Congressman McMillan to Congressman McCormack was to study and investigate the organization, management, and operations of any department of the District of Columbia government, and in this case was the District of Columbia school system.

As we allege in the complaint, the matters that I refer to, the page numbers, were obtained by a District police officer on assignment to the House District Committee from personnel of the District of Columbia schools and was caused to be included in the report by the committee.

We seek to enjoin further publication of the report with those matters in it.

THE COURT: Hasn't there been some publication of this report, or these reports?

[fol. 4] MR. WHITE: Yes, sir, there has.

THE COURT: How many reports have been published?

MR. WHITE: We don't know.

THE COURT: Many I suppose.

MR. WHITE: Probably so. We don't know the number.

THE COURT: What you are seeking to do is prevent further publication of this report?

MR. WHITE: That is correct, Your Honor, so long as it retains within it the matters which we explain—

THE COURT: —I might save you time. I read your complaint in this case, and memorandum of authorities, and I understand what the issue is.

You want this Court to enjoin the Public Printer, I suppose?

MR. WHITE: That is correct, sir.

THE COURT: From publishing this report.

MR. WHITE: Yes, sir.

THE COURT: Under what authority does this Court have the right to do that?

MR. WHITE: Your Honor, we allege a breach of Constitutional right in this case. The right being the right of privacy as enumerated in *Griswald* vs *Connecticut*. The right of privacy having been invaded, the Constitutional right of plaintiffs having been damaged, would give the Court authority to enjoin further injury to plaintiffs under this abridgement of Constitutional [fol. 5] right, particularly also the Civil Rights Act of 1871, which is 42 U.S.C. 1983.

THE COURT: Excuse me. Let the record show a representative is here from the Corporation Counsel's Office. Will you give your name for the record, please?

(entered courtroom)

MR. NEDRICH: Thomas R. Nedrich, Assistant Corporation Counsel for the District of Columbia.

THE COURT: Thank you, sir.

MR. WHITE: In our memorandum, Your Honor, on page 4, we include a discussion of the obviously troubling issue of whether or not the Speech and Debate Clause, Article I, Section 6 of the Constitution reaches the issue we present.

We run through the cases of *Powell* vs *McCormack*, and one coming since then, *Stamler* vs. *Willis*, et cetera.

We refer Your Honor to the decision of Judge Gesell in *Nat Hentoff* vs *Ichord* which that Court enjoined the Public Printer and Superintendent of Documents from printing and distributing the list of alleged radicals.

The discussion by Judge Gesell of the issues in that case indicate that this Court has the power to reach those officials and enjoin them from actions which would invade the rights, particularly the First Amendment rights in that case, of the plaintiffs.

The cases we believe to be controlling in addition to *Powell* vs *McCormack* are *Dombrowski* vs *Pfister; Dombrowski* vs *Eastland*, and a case—

[fol. 6] THE COURT: —that case against Senator Eastland involved issuance of subpoenas.

MR. WHITE: Yes, Your Honor.

THE COURT: Why is that analogous to this case?

MR. WHITE: That case involved as a matter additionally a tort claim against the respondent, chief counsel of the committee Mr. Sourwine, for tort allegedly committed against the plaintiff. The Court was very careful to point out that although the doctrine of congressional immunity is less absolute, although applicable when applied to officers who are employees of the legislative body rather than legislators themselves. The Court was very careful to indicate the dismissal of that action was wrong and it should be returned for a hearing on the merits. So the Court carved out a distinction between the congressional members and persons serving under them who are employees of the Legislative Branch which presumably would include the Public Printer and Superintendent of Documents.

I believe the rule of law that governs here, the test which appears to be emerging from the cases is whether

or not the congressional activity, and we are not talking here about debates on the floor or Congressional Record, is personally valid to legislative purpose. And if it is not, and there is infringement of Constitutional rights, First Amendment, then it would be appropriate for the Court to enter this area and enjoin the activity which is complained of.

[fol. 7] We allege in our memorandum that there is no valid legislative purpose for the inclusion of these materials in the Report. Let me discuss that briefly, if I may.

It is not our contention that any of the conclusionary matters stated in the Report, text of the Report, as to anything the Report found as a result of its investigations and hearings it conducted that we have any right or interest in enjoining those matters. It is not for us to be concerned with that. It is purely a legislative function. It is only where, and I have given the Court the page numbers we are concerned with, particularly where the committees included within the document actual test papers of students, actual absentee lists of students, and actual letters of disciplinary allegations to the parents, or memoranda within the school system. We submit in the brief and memorandum of authorities those matters are confidential and that their spreading upon the record is likely to and will have a chilling effect in the exercise of First Amendment rights of students, and I don't mean to be facetious, but it may sound somewhat odd to be talking about Fifth Amendment rights of students because it is a much different thing when we are talking about the Nat Hentoff and other people. But you see, mentioning now the way the case arose, but the parents took the child, following the publication without her knowledge of it, to a social worker in southwest which is interesting in itself in the sense the parent was suffi-
[fol. 8] ciently concerned with the student's mental balance as a result of that publication to seek counseling service, and as a matter of fact we allege this would impinge on their ability to speak out in class, to perform the things a student should have the right to do without being harassed or intimidate.

So we submit the inclusion of those matters is not a matter of valid legislative purpose. Certainly Congress can review and perhaps even see such documents. We don't for a moment concede that point, but assuming they could see them and extrapolate from them and write a report and summarize findings. We do challenge the case. That is what it is all about. The inclusion of those matters in the record.

As I say, the analogy to the case of *Hentoff* vs *Ichord* I believe is very clear. It is a very similar kind of case, although in Ichord the matter had not been printed. In this case it has been and we merely seek to hold it back.

I would suggest we meet the criteria for a Temporary Restraining Order set forth in the Green case in our memorandum and I needn't belabor those points since Your Honor has been over the papers. The issue is obviously very substantial in terms of the injuries of the parents and the children.

THE COURT: I take it you have a similar issue to the issue involved in the case which was decided by Judge Gesell?

MR. WHITE: That is correct, Your Honor. It does [fol. 9] involve an injunction of the Printer and Superintendent of Documents from distributing materials. We are not, as I said previously, concerned to enjoin the full report, merely that report with the complained of matters in it. If they excise those matters at this point we would be satisfied and have nothing further to seek as to relief as to those defendants.

The probability of success of the other matters we briefed, and I don't see any need to burden the Court with discussion of those cases, the common law right to privacy, the parent, the teacher and student privilege which is not a judicial recognized privilege but one we believe requires some protection. We see little, if any, permanent injury done to defendants if Your Honor is to grant preliminary relief in the temporary restraining order. Simply, they'd be held back from distributing that in the public domain. They of course have copies for their own use, we do not seek the Court holding

them back from reading their own report but simply to not let it go out further so there is further damages.

We also submit that there is a clear public interest involved here and that is the interest of the parents and students and I need not belabor that.

I might refer again as the power of the Court to protect the Constitutional rights of the citizens and enjoin the legislative official, not the congressman necessarily, but the operatives of the Congress.

[fol. 10] The case of Stamler vs Willis notes in the text of the opinion, which is at 1370 of the Federal Reporter:

> "Congress has no more right, whether through legislation or investigations conducted under an overbroadening . . . to abridge the First Amendment freedoms of the people than do other branches of government for free expansion of transcendant value to all society and not merely to those exercising those rights might be the loser."

Quotes from *Dombrowski* vs *Pfister*.

THE COURT: Let me ask you a question. If the Court decides that this committee has a valid and proper legislative purpose in conducting this hearing, even assuming for the purpose of argument that by publishing these names it might cause some embarrassment or damage to the persons mentioned, does this Court have the right to enjoin the Public Printer, or the Printer rather, from publishing and distributing this record which is based upon open hearings in the House? Do I have that right?

MR. WHITE: Yes, Your Honor.

THE COURT: By what authority? What law?

MR. WHITE: Let me clear up a factual issue, if I may.

The matters complained of, those reports, school papers, letters and lists were not obtained through hearings, they were obtained through an investigation which involved sending people to the schools and talking to the teachers, etc., so it didn't come out at hearings. These were sub-
[fol. 11] mitted and included in the record. These were

obtained through investigation and not through use of subpoena power, so it is not a question of whether this matter came voluntarily from the students or parents, or even an authorized overall school official, or District officer. They came apparently through, we would allege, clandestine or semi-clandestine ways. There is, of course, no statute that says the United States District Court Judge may enjoin the committee, or any officer of the Legislative Branch. Certainly not. We submit it is the inherent powers of the Court to protect the Constitutional right of the citizens, and the cases I believe support us on this matter, that that is where the power derives and I believe that is where Judge Gesell saw the power.

As I say, we allege in our complaint in this jurisdiction, the Civil Rights Act of 1871, that no person shall deprive another under color of state law of a civil right or right under the Constitution or statutes of the United States.

So it is not a matter of statute, of course, that grants the Court jurisdiction. The only statute on the subject in this jurisdiction would be our local jurisdiction on equity which is 11 D.C. Code 521, I think it is.

THE COURT: As I understand your argument, you are asking this Court to do precisely the same thing Judge Gesell did?

[fol. 12] MR. WHITE: I believe I'd have to say that is correct, Your Honor, because the effect of the order would be to enjoin the Printer and the Superintendent of Documents from further distribution of the report with the matters complained of in it.

THE COURT: Suppose this Court doesn't agree with Judge Gesell? I am not bound by his decision, I am only bound by the Court of Appeals decision and the Supreme Court.

MR. WHITE: I agree, Your Honor. I say simply that the authorities that Judge Gesell relied upon appear to be in support of his position. I only submit his position as persuasive as Your Honor points out does not bind you.

THE COURT: I understand your point. Who wants to speak next?

MR. HANNON: If the Court please, up until a few moments ago I had been under the impression that my appearance in this case was solely as amicus, but I see that my brothers, counsel for plaintiffs, named the United States of America as defendant to this action and I would conclude that the United States of America as defendant is sufficiently broad to encompass the Legislative Branch of our government.

If Your Honor please, I recall a number of years ago where plaintiffs came into this court and sought a temporary restraining order against the then House Un-American Activities Committee which is now the House Internal Security Committee, and was argued before one of your brother judges. I represented the Committee [fol. 13] at that time and argued as vigorously as I could the case law then in existence, and tried to persuade him this Court had no jurisdiction to enjoin legislative functions and he differed with me and granted the restraining order, and we were in the Court of Appeals that night, Your Honor, about 11:30, and by 8:00 o'clock in the morning had overturned his ruling.

I often asked myself subsequent to that time whether it was because of some remission in my part that something I did not tell that judge, some failure on my part that caused him to do what he did do.

I recently had the experience of appearing before Judge Gesell in connection with this Hentoff case which my brothers rely, and I argued against the temporary restraining order that issued in that case, Your Honor, and I wondered after he granted the temporary restraining order whether again by virtue of some failure on my part I failed to persuade him this Court had no jurisdiction whatsoever to do what he did in that case. And now I find myself again before Your Honor representing the United States of America and the Legislative Branch, compelled to argue once again that the fundamental doctrine of separation of powers prohibits this Court from doing what you are asked to do here.

I want to talk, if Your Honor please, about Judge Gesell's case because I differ with him. I have great

respect for him but I differ strongly with what he did in that case.

[fol. 14] The argument before Judge Gesell was made that publication of this list of speakers that have been going throughout the campuses of the United States and speaking, that the publication of that list identifying those speakers in some respect would chill their First Amendment rights, and that a chilling effect on the exercise of First Amendment rights purportedly is sufficient to give a Court of equity jurisdiction to enjoin a congressional function and that is not so. And *Dombrowski* vs. *Pfister*, the Supreme Court case, does not stand for that because the Supreme Court made it clear the chilling effect together with the course of conduct on the part of state officials which clearly indicated those people involved in that case could not get a fair trial in a criminal case, that that was the irreparable injury, the two coupled together.

Judge Gesell was of the view that chilling effect alone was enough to warrant equity intervention. He did it in two cases. He did it in another case involving the Post Office Department in which he sat as one of a three-judge court.

I say with all due deference to him, if Your Honor please, that even Judge Bazelon in the case involving Selective Service and General Hershey has said chilling effect alone is not enough, you have to look to see what the impact of that chilling effect is before you decide whether or not equity should intervene.

[fol. 15] Now there were two cases argued to Judge Gesell, both of them in this jurisdiction and both of which say this Court may not do what he did, and one of them is *Methodist Federation* vs *Senator Eastland*, and the other is *Black* vs *Hirst*.

Judge Gesell for reasons best known to him concluded since they were old cases, albeit one of them was decided by our Court of Appeals and the other was a three-judge court, that since they were old cases the passage of time had somehow overturned the ruling in those cases. And I respectfully say to Your Honor that that is not so, those cases are the law today in this circuit just as they were when written.

I want to tell Your Honor if I may, please, with respect to *Methodist Federation*—it is reported at 141 F.Supp. 729. And in that case, if Your Honor please, that was a three-judge court case, Methodist Federation social acts against Eastland, the three-judge court said: "Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether it is dematory or not and whether or not it is made after fair hearing. Similarly nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement."

Then the Court continued and said: "We have no authority to prevent Congress or any committee or public [fol. 16] officer acting in the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record."

That is still the law in this jurisdiction, if Your Honor please.

The Supreme Court said in *Kilburn* vs *Thompson*, an old case, 1880, but still the law:

> "It would be a narrow view of the Constitutional provision," —relating to the Speech and Debate Clause— "to limit it to words spoken in debate. The reason of the rule is as forceable in its application to written reports presented in that body by its committees to resolutions offered which though in writing must be reproduced in speech, and to the act of voting whether it is done vocally or by passage between the tellers. In short, to things generally done in the House by one of its members in relation to the business before it."

Then again in Kilburn the Court said:

> "It would be a narrow view to confine the protection of the Speech and Debate Clause to words spoken in debate, committee reports, resolutions, any act of voting are equally covered as 'things generally

done in session of the House by one of its members in relation to the business before it.' "

[fol. 17] If Your Honor please, in *Hirst* vs *Black*, which was the United States Conrt of Appeals for this circuit, 66 App. D.C. 313, 87 F.2d 68, the Court there said, if Your Honor please:

"The universal rule so far as we know it is that the legislative discretion and discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference. The Constitution has lodge the legislative power in the Congress. If a Court can say to the Congress that it could use or could not use information in its possession the independence of the legislation would be destroyed and the constitutional separation of powers of government invaded. Nother is better settled than that each of the three great departments of government shall be independent and not subject to the control directly or indirectly by either of the others. This separation and consequent exclusive character of the powers conferred upon each of the three departments is basic and vital, not merely a matter of government mechanism."

Now, if Your Honor please, I argued these cases to Judge Gesell and they were argued again when the motion for preliminary injunction was heard and the case disposed of on the merits. And when I argued before him I told him, Your Honor, as I tell you, that one of the great responsibilities of the three branches of this government is to avoid confrontation in issues spelled [fol. 18] out in Separation of Powers Doctrine. And I told him that if he granted the restraining order in that case because of socalled chilling effect on First Amendment rights, he would bring about this confrontation.

Now I have submitted to Your Honor—I should say more appropriately, the House Internal Securities Committee has filed with the Clerk of this Court a copy of House Resolution 1306. And in that House Resolution the House of Representative ordered the Public Printer

to do what Judge Gesell ordered him not to do. He has done it. He has printed the Report that the Judge ordered not be printed, and it has been distributed.

The House of Representatives in that House Resolution has in effect said to Judge Gesell: We now enjoin you from arresting the Public Printer in order to enforce your decree that you entered against him.

And so for the first time to my knowledge in the history of American jurisprudence, if Your Honor please, we have confrontation between the Judiciary and the Congress of the United States, a terribly, terribly unfortunate circumstance, in my judgment.

Now, what is it that impelled Judge Gesell to do what he did in that case? I read his opinion, if Your Honor please. Judge Gesell was of the view that the House Internal Security Committee in the Hentoff case was publishing the list of speakers that has gone around to the nation's campuses speaking, publishing the list [fol. 19] for no legitimate, legislative purpose. Query? Does he have a right in the first instance to determine whether for example it is necessary and proper in accordance with the Speech and Debate Clause for the Congress to inform itself as to who the speakers are when it puts their names in this Report? I respectfully suggest he does not. But nonetheless, he was of the view that there was no legitimate legislative purpose involved in the issuance of that House Committee Report, and he said in effect, that the list of names were being published for the sake of exposure and intimidation, and that purpose only. And for that reason he said he was going to enter a restraining order enjoining the publication of the list of names which has since been published and republished.

So where are we, if Your Honor please, in connection with this case? Judge Gesell said in the Hentoff case: no legitimate legislative purpose; he could discern none. But any student of constitutional law, if Your Honor please, has no difficulty in understanding that the Congress of the United States has the exclusive Constitutional power to legislate for the District of Columbia

government; they are the exclusive legislative body for the District of Columbia.

To say the Congress of the United States cannot conduct a hearing into how the school system in the District of Columbia is being operated is a fabrication on its face, if Your Honor please. The legislative purpose in [fol. 20] conducting this hearing by this committee is obvious on its face.

And so as contrasted from the Hentoff case where Judge Gesell said no legislative purpose, my brothers can't represent to this Court that this committee, the House District Committee, had no legislative purpose in mind when it conducted its inquiry with respect to the District of Columbia school system because obviously it did.

And so there was a genuine legitimate, legislative purpose the responsibility of this Court ends at that line. You go no farther, Your Honor, if you are satisfied legitimate, legislative purpose, you stop there.

And I suggest what they are saying to the Court, and they are free to say it if that is their opinion, that they are quarreling with the prudence, the wisdom, and judgment of the committee in identifying students by name. But that is all they are doing. That is not illegality, that is prudence. They are challenging the prudence of the committee in doing what it does, and it hardly give this Court jurisdiction to enter the type of restraining order that they are asking here.

So I respectfully urge Your Honor to deny the temporary restraining order that they seek here.

THE COURT: Counsel, do you want to say anything on behalf of the District?

MR. NEDRICH: Very briefly, Your Honor.

If Your Honor would take a moment to look at this [fol. 21] matter which I hand up (handed to the Court). Your Honor, this is a resolution proposed by the Superintendent of Schools of the District of Columbia to the Board of Education of the District of Columbia Rules Committee.

I was in attendance of the Rules Committee meeting Monday night when this document was proposed, and is

being modified now and the Rules Committee already adopted the substance of the document.

Commenting briefly on it, I do not think at this point really local legal matters anyone has aroused so much controversy over the last several months as the one involving the publication of these children's names. The School Board and the school administration are most concerned about this.

THE COURT: Excuse me. Make this part of the record. (referring to document handed to the Court)

MR. NEDRICH: Your Honor, I will offer it as District Defendant's Exhibit "A".

THE COURT: Very well.

MR. NEDRICH: The School Board and school administration are most concerned about this matter and are taking appropriate steps to cure the matter. There is already in the board rules, rules of the Board of Education of the District of Columbia, a prohibition against releasing what is deemed to be confidential information to members of the public.

[fol. 22] As Mr. Hannon so well pointed out, however, there is very little choice which the District of Columbia school system has with regard to withholding information from members of Congress. Once they get that information we really cannot control what they do with it.

Now, directing myself to point "a" of plaintiffs' motion with regard to this report entitled Investigation and Study of the Public School System of the District of Columbia, I think it seems clear we have nothing to do with that report since we didn't prepare it.

Point "b", from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia.

Your Honor, this is entirely too broad, it is terribly inappropriate. The School Board and school administration are taking steps to insure what they deem to be confidential records of children are not abused. I think

it would have done plaintiff a great deal more credit rather than run immediately to this Court to approach the School Board, or approach the administration and ask them what they intended to do about this rather than try to use a judicial club. They do have responsibilities, [fol. 23] they are aware of their responsibilities, there are other matters of public record, the test scores which were published earlier this week in the Washington Post, are clearly matters of public record; they involve no students' names, however they do classify scores of achivement for reading and mathematics for each of the elementary and secondary schools of the District of Columbia, and the public are entitled to know this information.

I think plaintiffs at least ought to direct itself to a specific point as to what they want to enjoin with regard to the District defendants and see whether or not the District defendants have not through this document indicated that they are already proceeding to do this.

I do not think any relief is necessary from the Court to the plaintiffs at this time, Your Honor.

Thank you.

THE COURT: Do you wish to reply?

MR. WHITE: May I, Your Honor? Thank you.

As to one of the points that counsel for—Federal counsel made, we, contrary to what he says, do not allege there is no legislative purpose to conduct the hearing. Nor that there is no legislative purpose to the publication of the Report. Those are matters within Congress' discretion. We do not seek to have the Court invade that at all.

However, it is the names of the students. It is their test papers. Johnnie Jones got an "F"; Mary Smith got [fol. 24] an "f", etc. We submit has absolutely nothing to do with legislation, absolutely nothing to do. It is just a simple question: Does the Congress have the right to publish a test paper of a student for apparently no reason other than to highlight the fact he or she failed in school? The fact perhaps that other students are failing, or that the level of reading is down—

THE COURT: —wasn't that all part of the investigation to inquire into these matters? Didn't Congress have a right to inquire into these matters you are speaking about through its lawful committee?

MR. WHITE: Certainly. It has every right as Mr. Hannon points out to investigate the District of Columbia schools we have no quibble with that. They may investigate, they may go into the schools and talk to people, perfectly legitimate. We don't question it; it would be fruitless and facetious of us to do that. However, once they have done that we submit they just simply cannot reproduce deflamatory, inflamatory, confidential materials. Letters for instance, from a principal to a parent, saying Mrs. Smith, your daughter today broke a window. No one has adjudicated whether it is true or not. It doesn't really matter whether it is true or not, it is just simply a private matter.

THE COURT: Tell me something: what was the com- [fol. 25] mittee trying to determine as a result of the resolution that authorized the Committee to act? What were they looking into?

MR. WHITE: It is unclear, Your Honor, but let me read—as I understand, the House Resolution that authorized the investigation—

THE COURT: —read the resolution.

MR. WHITE: The special subcommittee—it authorizes the D.C. Committee to conduct a full and complete investigation and study of any department of the District Government. That of course gives the authority—

THE COURT: —that is not the full resolution. You didn't read the whole resolution, the resolution upon which the Committee acted or was organized.

Here is the resolution, I will read it into the record and you correct me if I am in error.

> "Resolved, That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> "(1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia.

"(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and

[fol. 26] "(3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: provided, That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

"For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary . . ."

So it has pretty broad powers, I think.

MR. WHITE: I agree, Your Honor, but if Your Honor would take a look, for instance, at page 228 of the Report. I submit, and this is my opinion, that there is absolutely no legislative purpose in having that page included in that report. I won't mention the names since we are proceeding under fictitious names but for the sake of argument, it is Marie Doe got an "F" on a school paper that apparently had to do with history, had to do something about history of slaves. And date on it is the [fol. 27] 6th of May 1970. I see nothing in that that is in any way related to the resolution you just read. That resolution indicates the Committee can investigate, can subpoena documents, it can compel witnesses, it can go around to the schools as it did. We have no quibble with that, and this is where I disagree with Mr. Hannon, where I agree with Judge Gesell and submit his view is the correct one. He says that nothing that nothing that

they do can be enjoined, basically. Nothing that the Congress does can be enjoined. Judge Gesell says where they invade the Constitutional right they can be enjoined.

Let me make a couple of comments about what Mr. Nedrich mentioned. As Your Honor noted we are also seeking preliminary relief against the District defendants, the School Board and principals involved.

We firmly believe that the breaches of privacy that occurred in connection with this report are so severe that no professions of after-the-fact willingness to take corrective action can protect the rights of these plaintiffs and others in a similar position.

Very simply, Your Honor, it is that school test papers and school disciplinary matters and lists involving absentees have been spread upon the public record. Who is to say that they won't spread upon the public record through newspapers, through whatever now, it is because they say Congress told us to do so but I submit failure [fol. 28] to have rules that tells their personnel what sort of matters are confidential and what not. Failure of this clause of what injury presently exist . . . willingness to change, I think is fine; simply doesn't cure the evil and pernicious nature of the injury that has occurred heretofore, and we submit unless we enjoin it may continue.

THE COURT: All right. Now the Court is ready to rule in this case.

The Plaintiffs in this case seek this Court's determination that the printing of Plaintiffs' names are violation of the Plaintiffs' Constitutional and Common Law rights of privacy. Plaintiffs contend that knowledge of their identity in this case should not be available to the public at large, and were the public record to identify the plaintiffs would no doubt invade the right of privacy that the Plaintiffs are seeking to protect and aggravate the damage of Plaintiffs' reputations already caused by the publication of the report in question.

This is taken verbatim from Plaintiffs' motion for leave to proceed under fictitious names.

The Court in this case finds that the hearings of the Committee had a legitimate and proper legislative purpose, and the publication of the matters complained of did not violate the Plaintiffs' and their children's statutory, regulatory, administrative, Common Law or Constitutional rights.

The Court further finds that there is not a reasonable probability of success on its merits.

[fol. 29] As counsel for the government pointed out, there is involved here a question regarding the separation of powers, and this Court in this Court's opinion has no jurisdiction whatsoever to interfere with the report which is being circulated, published by the Congress, circulated, disseminated by the Printer.

This Court regrets, of course, it has to differ with the Court's colleague, Judge Gesell, a great judge, a trial judge for whom I have the greatest respect and admiration and affection. I do not agree with him. I agree with the arguments advanced by Mr. Hannon representing the government in this case, and also the Corporation Counsel's representative.

We have here three independent, separate parties: Legislative, Executive and Judicial. And this Court, to repeat again, has absolutely no right under the facts in this case to interfere with the functions of the Legislative Branch of the government.

This Court, fortunately, is not bound by the opinion or decision of any District Judge on this Court or any District Judge in this country, and is only bound to follow, and must follow, and I do follow to the best of my ability, the opinions of this Court of Appeals and from time to time other Courts of Appeals of the Federal Judiciary, and of course including the Supreme Court of the United States.

[fol. 30] I find that the issues of the questions raised in this case are frivolous and not substantial. Therefore, the motion for Temporary Restraining Order is denied.

I also call attention to the Resolution that was mentioned by Mr. Hannon which was passed by the House —has not as yet been passed by the Senate, and I will

read it, pages 17 and 18 state—this is known as House Resolution 1306:

"NOW THEREFORE BE IT RESOLVED, That—

(1) In accordance with the Rules of the House of Representatives and the acts of Congress made and provided, the Public Printer and the Superintendent of Documents shall forthwith print, publish, and distribute, and they are hereby ordered forthwith to print, publish, and distribute to and for the use of the House of Representatives, the Committee on Internal Security of said House, and those entitled to receive them, the usual number of copies of the report (No. 91-1732) of said Committee on Internal Security titled, 'Report of Inquiry Concerning Speakers' Honoraria at Colleges and Universities,' which has this day been duly reported to the House.

(2) All persons, whether or not acting under color of office, are hereby advised, ordered, and enjoined to refrain from doing any act, or causing any act to be done, which restrains, delays, inter-
[fol. 31] feres with, obstructs, or prevents the performance of the work ordered to be done by paragraph numbered (1) hereof; and all such persons are further advised, ordered, and enjoined to refrain from molesting, intimidating, damaging, arresting, imprisoning, or punishing any person because of his participation in, or performance of, such work.

(3) Copies of this resolution shall be forthwith furnished by the Clerk of the House to the Public Printer, Superintendent of Documents, and the clerks of the United States District Court and of the United States Court of Appeals for the District of Columbia."

Even though this Resolution has not been enacted into law this Court agrees wholeheartedly with the statements contained therein.

This motion for Temporary Restraining Order is denied.

MR. WHITE: May I ask a question, Your Honor?

THE COURT: Will you please prepare an appropriate order?

MR. HANNON: Yes, sir.

MR. WHITE: Does Your Honor's ruling cover the preliminary injunction?

THE COURT: The complaint is dismissed as being frivolous.

MR. WHITE: The entire case?

[fol. 32] THE COURT: Yes. I thought I covered everything in my oral opinion.

You are all set to now take this case to the Court of Appeals.

MR. WHITE: Thank you, sir. I just wanted to clear it up.

(Adjourned at 5:20 p.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

/s/ Nicholas Sokal
NICHOLAS SOKAL
Official Reporter

Policy Statement Regarding Congressional Inquiries

Due to the numerous Congressional inquiries related to the Public Schools of the District of Columbia, the Board of Education has determined the need to establish certain policies in order to prevent the disclosure of confidential information and reports regarding students and school personnel. It is the view of the Board that there are aspects of the professional relationships of school personnel with students, parents, and community which must be considered privileged and remain confidential. At the same time, the Board recognizes its responsibility to provide the Congress with the information about the conduct of school affairs to which it is legally entitled.

The Board of Education in an effort to provide for the protection of the confidentiality of certain information related to school affairs and to respond appropriately to Congressional inquiries into the conduct of school affairs in the Public Schools of the District of Columbia establishes the following policies with regard to the release of information to the Congress.

1. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take all necessary steps to insure that the confidentiality of such privileged information is protected when its release may be demeaning or discrediting to a student or group of students.
2. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take every necessary step to protect the confidentiality of such information when there is any reason to believe that its release may be injurious to any individual or group.

3. The Board of Education and the Superintendent or his designee shall be the only persons authorized to transmit information officially requested by the Congress pertaining to the conduct of school affairs.
4. The Board of Education and the Superintendent or his designee are the only persons authorized to provide official interpretations of Board of Education policy with regard to the release of information to the Congress.

December 23, 1970

[Tendered to the District Court as District Defendants' Exhibit A on January 8, 1971]

UNION CALENDAR No. 812

91st Congress, 2d Session — — House Report No. 91-1681

INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA

REPORT

OF THE

COMMITTEE ON THE DISTRICT OF COLUMBIA HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS
SECOND SESSION

PURSUANT TO

THE LEGISLATIVE REORGANIZATION ACT OF 1946

[Congressional Emblem]

December 8, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Counsels' Note:

[Pertinent provisions of this Report have been submitted to the Clerk of the Supreme Court with a written request that it be made available for inspection only by Court personnel.]

[H. Res. 76, 91st Cong., 1st sess., agreed to February 5, 1969]

RESOLUTION

Resolved, That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:

(1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;

(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and

(3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: *Provided*, That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated

by him, and may be served by any person designated by such chairman or member.

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Funds authorized are for expenses incurred in the committee's activities within the United States; and, notwithstanding section 1754 of title 22, United States Code, or any other provision of law, local currencies owned by the United States in foreign countries shall not be made available to the Committee on the District of Columbia for expenses of its members or other Members or employees traveling abroad.

Letter of Transmittal

House of Representatives,
Committee on the District of Columbia,
Washington, D.C., December 8, 1970.

Hon. JOHN W. McCORMACK,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There is herewith submitted pursuant to the Legislative Reorganization Act of 1946, an interim report of the Committee on the District of Columbia which was authorized and directed to conduct a full and complete investigation and study of—

(1) the organization, management, operations and administration of any department or agency of the government of the District of Columbia; and

(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia,

pursuant to the terms of House Resolution 76, 91st Congress, 1st session.

The enclosed report is based upon the hearings and investigations of the Special Select Subcommittee of the Committee on the District of Columbia, which was authorized and directed to devote itself to some of the problems extant in the operations of the Government of the District of Columbia.

This report is a summary of that Subcommittee's investigations and hearings particularly devoted to the public school system of the District of Columbia.

Sincerely yours,

JOHN L. McMILLAN
Member of Congress, Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jan. 11, 1971, James F. Davey, Clerk]

[Title Omitted]

ORDER

This cause came on for hearing on January 8, 1971 upon plaintiffs' application for a temporary restraining order and upon consideration of the application, pleadings, exhibits and argument of counsel for plaintiffs, the District of Columbia defendants and the defendant United States of America made in open Court the following appears to the Court:

1. Plaintiffs seek an injunction from this Court that would enjoin the further printing and distribution of the minor plaintiffs' names in a report issued by Committee of the District of Columbia of the United States House of Representatives entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 9-1681). Further, they seek a declaration that this Committee report is violative of their statutory, regulatory, administrative, common law, and constitutional rights.

The Court has examined the Committee report which was furnished as an exhibit. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution Congress has exclusive legislative jurisdiction over the Disgress of Columbia. Under the circumstances the House Committee report as shown by the Committee resolution has a legitimate and proper legislative purpose. This being so, this Court lacks jurisdiction to afford plaintiffs the injunctive relief sought against the Committee of the District of Columbia and its subordinates. The fundamental principle of separation of powers compels this conclusion.

2. With respect to plaintiffs' request for a declaratory judgment that the Committee report violates certain rights of plaintiffs the Court observes that this action as

brought by plaintiffs includes tort claims made against the named federal government defendants, District of Columbia government authorities and the United States of America. Discussing these defendants *seriatim*, it is clear that the complained of actions alleged against the federal-officer defendants were performed by them in the course of their employment as members of the legislative branch of the United States government and under the official immunity doctrine of *Barr* v. *Matteo*, 360 U.S. 564 the acts complained of are absolutely privileged. For this reason the complaint fails to state a claim against the named defendants of the legislative branch of the federal government, and must be dismissed.

3. The named defendants of the District of Columbia government are the individual members of the Board of Education of the District of Columbia government, the Superintendent of the District of Columbia Public Schools, the principal and one teacher of the Jefferson Junior High School. Assuming that the alleged acts set forth in the complaint were in fact committed by the named District of Columbia officials, then it is clear that the acts were discretionary ones and not ministerial. Since a public officer cannot be liable in money damages, even if he acted negligently, so long as the act was discretionary, *Kendall* v. *Stokes*, 1845, 3 How. 87, 98, 44 U.S. 87, 98; *Cooper* v. *O'Connor*, 1938, 66 U.S. App. D.C. 100, 102, 99 F.2d 135, 137; *Tucker* v. *Duke*, 107 U.S. App. D.C. 253, 276 F.2d 499 (1960) the complaint fails to state a claim against these public officials upon which relief can be granted.

4. The last named defendant in the complaint is the United States of America and since plaintiffs cite 28 U.S.C. 1346 in their jurisdictional statement it would appear that the United States is being sued under the Federal Tort Claims Act. Plaintiffs however have not alleged in their complaint as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure exhaustion of the administrative remedy which according to 28 U.S.C. 2675(a) must be asserted against the appropriate federal agency and finally denied before this Court can exercise its jurisdiction over the United States in the context

of this action. Since this Court does not now have jurisdiction over the United States the complaint should be dismissed.

In view of the foregoing it is by the Court this 11th day of January, 1971,

ORDERED that plaintiffs' application for a temporary restraining order be and the same hereby is denied; and it is

FURTHER ORDERED that the complaint be and the same hereby is dismissed as to all defendants.

/s/ John J. Sirica
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Order has been made upon plaintiffs by mailing a copy thereof to their attorney, J. Kirkwood White, Esquire, Suite 509, 1145 19th Street, N.W., Washington, D.C. 20036, on this 11th day of January, 1971.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

NOTICE OF APPEAL—Filed January 12, 1971

Notice is hereby given that John Doe, by his Guardian Mary Doe, and Richard Roe, by his Guardian Mary Roe, on their own behalf and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order denying preliminary relief and dismissing their Complaint entered in this action on the 11th day of January, 1971, by the Honorable John J. Sirica, United States District Judge.

Date: 11 January, 1971

/s/ Jean Camper Cahn
JEAN CAMPER CAHN

/s/ J. Kirkwood White
J. KIRKWOOD WHITE

/s/ Dennis Dutterer
DENNIS DUTTERER
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

December 23, 1970

JOINT STATEMENT:

Superintendent of D. C. Public Schools, Dr. Hugh J. Scott
/s/ Hugh J. Scott

President of the Board of Education, Mrs. Anita F. Allen
/s/ Anita F. Allen

The District of Columbia Board of Education and the school administration find it difficult to reconcile the recently released Report of the Special Select Subcommittee of the House Committee on the District of Columbia with its avowed intention to hold hearings in an effort to "help" the D. C. Public Schools. We find it totally incomprehensible that a Committee of the Congress of the United States would include in its public report confidential and detrimental material about school children who are named in that report. It is also unbelievable that the Committee would publish reports about pupils without giving these pupils or their parents the right to speak in their own defense.

In terms of the harmful effects of publicity, the Juvenile Courts protect youths charged with serious crimes better than the District Committee protects innocent and conscientious students who attempted to pass a 15-question test and failed.

Both the policy of the Board of Education and administrative practice require that personnel matters related to staff and confidential matters related to pupils be discussed only in closed sessions of the Board. This requirement is based on the law which established the Board of Education, a law enacted by the Congress, which now finds one of its Committees in violation of the letter and spirit of the law providing for an elected Board of Education.

The D. C. Public School System through the Board of Education and administration reaffirms its commitment to protect the confidentiality of personnel matters and to guard against the disclosure of confidential reports about students. In this respect the Board of Education will

adopt necessary amendments to its Rules and the Superintendent will establish corresponding administrative procedures to assure that the unfortunate disclosures do not re-occur.

It is confident that the attitudes toward pupils and personnel which are reflected in the Committee's report are not indicative of the attitude of the total Congress.

The Committee requested the Board of Education to provide legislative recommendations to the Committee which would assist the Board of Education and the school administration in better serving the education needs of our students. A number of legislative recommendations were furnished the Committee during the public hearings. To date we are unaware of a single legislative recommendation being introduced in the House of Representatives, let alone the enactment of any legislation. If the Committee sincerely wants to be helpful, we would urge it to have the legislative recommendations introduced in Congress in January, and promptly enacted.

[Submitted to the United States Court of Appeals for the District of Columbia Circuit during Oral Arguments on Motions for Summary Reversal and Summary Affirmance.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1970

Civil Action 56-71

[Filed Jan. 14, 1971, United States Court of Appeals for the District of Columbia Circuit, /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Before: Wright and Tamm, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' motion for summary reversal of the District Court's order denying a temporary restraining order and dismissing the complaint, or for injunction pending appeal, and for expedited hearing and consideration thereof, and in order to provide an opportunity for the Court to more fully consider appellants' motion and appellees' response thereto, which is due on or before January 19, 1971, it is

ORDERED by the Court that appellees Robert E. King, Superintendent of Public Documents, and Nicholas A. Spence, Public Printer, be enjoined from further printing and distribution of *Investigation and Study of the Public School System of the District of Columbia, Report of the Committee on the District of Columbia, House of Representatives*, H.R. Rep. No. 91-1681, 91st Cong. 2d Sess. (Dec. 8, 1970), unless references to the names and addresses of students or their parents or guardians, contained in student absentee lists, letters, memoranda and other papers regarding student disciplinary problems and

student test papers which are incorporated in said report, are deleted, until further order of this Court, and it is

FURTHER ORDERED by this Court that appellees Clark, Gasque, Garber and Little, agents of the Committee on the District of Columbia of the House of Representatives, appellees Allen, Coates, Alexander, Cassell, Hancock, Roots, Rosenfield, Swaim, Taylor, Tirana and Washington, President and Members of the Board of Education of the District of Columbia, appellee Scott, Superintendent of the Public Schools of the District of Columbia, appellee Savoid, Principal of Jefferson Junior High School, appellee Irven, teacher at Jefferson Junior High School, and appellee Martin be enjoined from publication and distribution of student absentee lists, letters, memoranda and other papers regarding student disciplinary problems and student test papers, unless such materials contain no reference to the names or addresses of students or their parents or guardians, until further order of this Court.

The foregoing action does not reflect any consideration by this Court of the merits of appellants' motion, but is only intended to preserve the status quo pending the filing of appellees' response to the aforesaid motion and consideration on its merits.

Per Curiam

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027

JOHN DOE, ET AL.

v.

JOHN L. MCMILLAN, ET AL.

On Appellants' Motion for Summary Reversal (or for injunction pending appeal) and on Appellees' Motions for Summary Affirmance

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Decided March 11, 1971

Messrs. J. Kirkwood White and *Dennis Dutterer,* with whom *Mrs. Jean Camper Cahn* was on the pleadings, for appellants.

Mr. David P. Sutton, Assistant Corporation Counsel, D.C., with whom *Messrs. C. Francis Murphy,* Acting Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, were on the pleadings, for the District of Columbia appellees.

Mr. John A. Terry, Assistant United States Attorney,

with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *Joseph M. Hannon,* Assistant United States Attorney, were on the pleadings, for the Federal appellees.

Before: FAHY, *Senior Circuit Judge,* TAMM and LEVENTHAL, *Circuit Judges.*

Opinion per curiam.
Dissenting opinion filed by TAMM, *Circuit Judge.*

PER CURIAM: Plaintiff-appellants in this case are students at Jefferson Junior High School and their parents. Defendant-appellees are (1) the Chairman and Members of the Committee on the District of Columbia of the House of Representatives, (2) the Clerk, Staff Director, Counsel and a consultant to the Committee, (3) the Superintendent of Public Documents and the Public Printer, *i.e.,* the Government Printing Office, (4) the President and Members of the Board of Education of the District of Columbia, (5) the Superintendent of the Public Schools of the District of Columbia, (6) the Principal of Jefferson Junior High School, (7) a teacher at Jefferson Junior High School, (8) a District of Columbia Police Officer acting as an investigator for the Committee, and (9) the United States.

Appellants brought a class action in the District Court for damages and for an injunction against further publication and distribution of certain school documents identifying them personally. Notably, they sought to enjoin further publication and distribution of a House District Committee Report on the District of Columbia school system containing copies of (1) student absentee lists, (2) letters, memoranda, and other papers regarding student disciplinary problems, and (3) student test papers, because these documents included their names

and addresses.[1] Appellants allege that such publication violates their constitutional right to privacy.

The District Court denied appellants' motion for temporary relief and dismissed their complaint. This appeal followed. Appellants moved for summary reversal or an injunction pending appeal. On January 14, 1971, this Court issued an injunction to preserve the status quo until responses were filed. The order did not enjoin members of the Committee or the United States, but did prohibit the other defendants from any further publication and distribution of such papers, in the Report or otherwise, as long as the papers contained the names and addresses of pupils and parents. The appellees have now responded, and moved for summary affirmance.

This appeal raises difficult questions concerning appellants' claimed right of privacy and the immunity claimed by appellees acting pursuant to the authority of the House District Committee. Summary treatment of these issues would be inappropriate. We therefore deny appellants' motion for summary reversal and appellees' motions for summary affirmance. Instead, we order that the case be set for argument on an expedited basis as soon as possible after the briefs are filed.

With regard to appellants' request for continuation of the injunction pending appeal, the Court is sensitive to the importance of avoiding "needless friction" between the judiciary and the legislature.[2] However, our consti-

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[1] *Investigation and Study of the Public School System of the District of Columbia, Report of the Committee on the District of Columbia, House of Representatives,* H.R. REP. No. 91-1681, 91st Cong., 2d Sess. (Dec. 8, 1970).

[2] *Ansara* v. *Eastland,* No. 24,816 (D.C. Cir., Jan. 11, 1971) (slip opinion at 3). *See also Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 500 (1941); *Cole* v. *McClellan,* No. 23,424

tutional obligations require us to take into account the claim of irreparable harm caused by continued publication and distribution of the Report containing names and addresses of pupils and parents. Appellants' claim that they will be publicly stigmatized is substantial, and their claim of invasion of constitutional privacy, and lack of proper legislative purpose to warrant such invasion to the extent of broadcasting names and identities, is worthy of serious consideration on the merits. The dimensions of the constitutional issue have been heightened by a recent Supreme Court decision that official publication of a list of names stigmatizing individuals, without notice or hearing, violates due process of law; two Justices concluded that the list constituted a bill of attainder, a point not reached by the majority.[3]

In one respect, we conclude that the injunction previously entered should be modified. The simple fact of a student's absence from public school, like his presence there, is less significant in terms of protected privacy than his performance on a particular test or his disciplinary difficulties. We modify the injunction to permit the publication of names of students absent from school.

The injunction as so modified will be continued in effect pending the expedited litigation. We reiterate that this order does not apply to the Congressmen, and we further stress that it permits the Committee staff and other defendants to participate in publication and distribution of the Report following excision of the names and addresses of particular individuals from test papers and from any references to disciplinary problems. If this

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(D.C. Cir., Nov. 6, 1970) (slip opinion at 4); *Davis* v. *Ichord*, No. 23,426 (D.C. Cir., Aug. 20, 1970) (slip opinion at 19-26) (Leventhal, J., concurring).

[3] *Wisconsin* v. *Constantineau*, 39 U.S.L.W. 4128 (Jan. 19, 1971).

Court ultimately upholds the authority to publish the identities of individuals, they could be added in a supplemental report. The Court has not been advised of an imminent legislative need for the enjoined defendants to participate in immediate publication and distribution of names and addresses. Under the present circumstances, we conclude that continuation of the injunction as modified, pending determination of an expedited appeal, is a responsible exercise of our duties.

So Ordered.

TAMM, *Circuit Judge, dissenting*: I would deny appellant's motion for summary reversal and grant appellee's motion for summary affirmance. In my view, no purpose is served by further delaying a disposition of this cause, albeit it nominally permits the filing of additional briefs which in actuality can only contain material which is repetitious of what is now before us. I see no purpose in now cautiously walking around the quicksand of a separation-of-powers question by delaying a head-on confrontation of the problem. No number of additional briefs or arguments can erase or hide the nature of the problem already briefed and argued before us.

Challenged herein is the publication by the House Committee on the District of Columbia of a report on the school system of the District of Columbia which was issued on December 8, 1970, as "INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA, REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA, HOUSE OF REPRESENTATIVES, H.R. REP. No. 91 1681, 91st Cong., 2d Sess." The District Judge properly found that this report had a valid legislative purpose growing out of the legislative power of Congress over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17. The self-stated object of the report is "to give a realistic view of this troubled school, and the lack of administrative efforts to

rectify the multitudinous problems there." Certainly a conscientious Congress, called upon to authorize the expenditure of more than $150,000,000 a year[1] of the taxpayers' money for the operation of a public school system, is justified and required to determine if the school population is receiving full value from this investment.

The challenged report does set out attendance lists, history test papers, and correspondence on disciplinary problems all of which contain the names of students. Certainly these documents constitute the best available evidence of the facts which they portray. Also contained in the report are the oral answers of witnesses before the committee who furnished the names of students participating in and creating disciplinary problems (see page 212 of the report), and yet there appears to be no question raised as to the legality or propriety of this testimony. As a matter of evidentiary appraisal I see no difference in the status of documents containing names of individuals and oral testimony of the same type.

Of major concern to me, however, is the question of what, if any, authority this court has to pass upon the action of Congress in this situation. While I may doubt both the necessity and wisdom of the inclusion of data identifying individual students, I am required by time-tested law to recognize the legality, if not the virginity, of congressional power. My judicial responsibility requires me to validate, when called upon to do so, the legality of congressional action which is within the legislative power as defined by the Constitution and case law. This recognition of the limitations upon judicial interference with the legal actions of the legislative branch has been recognized

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[1] The current press indicates the requested budget for the next fiscal year's operation of the public school system of the District of Columbia exceeds $150,000,000.

since 1805, when Chief Justice Marshall, speaking for the Court in *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 395 (1805), stated: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." It is my view that the majority opinion ignores the mandate expressed by Marshall that "to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 315, 422 (1819). I recognize that "[t]he Government which has the right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select *any* appropriate means, *that one particular mode* of *effecting the object* is excepted, take upon themselves the burden of establishing that exception." *McCulloch v. Maryland, supra* at 409. (Emphasis added.) I do not believe the majority opinion establishes any exception applicable to this case. The line of cases supporting this doctrine is too well established to require lengthy citation.

I am, in addition, concerned that the majority predicates its action on an appellant's claimed "right of privacy." It does seem to me that the vagaries created in this area since *New York Times v. Sullivan,* 376 U.S. 254 (1964), establish an emblem of identity as the legal measure of not only the breadth and depth of this "right" but even of its existence in individual cases. A licensed physician and the medical director of a Planned Parenthood League have a right to privacy (*Griswold v. Connecticut,* 381 U.S. 479 (1965)), but an elected county official has no such right. *New York Times v. Sullivan, supra.* I am unable by any amount of legal engineering to perform such a task of con-

stitutional alchemy as to find a legal "right to privacy" in truant school children, but no such right in a United States Senator. *Pearson v. Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, *cert. denied*, 395 U.S. 947 (1969).

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1970

Civil 56-71

[Filed Mar. 11, 1971, United States Court of Appeals for the District of Columbia Circuit, /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL.

v.

JOHN L. MCMILLAN, ET AL.

Before: Fahy, Senior Circuit Judge, and Tamm and Leventhal, Circuit Judges

ORDER

This cause came on for consideration on appellants' motion for summary reversal (or for injunction pending appeal) and on appellees' motions for summary affirmance, and the Court heard argument of counsel. On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid motions are denied, and it is

FURTHER ORDERED by the Court that this Court's injunction of January 14, 1971, is modified to permit the publication of names of students absent from school, and the injunction as so modified will be continued in effect pending the expedited litigation, and it is

FURTHER ORDERED by the Court that appellants' brief shall be filed on or before April 12, 1971, appellees' brief and the appendix of the parties shall be filed on or before May 7, 1971, and appellants' reply brief, if any, shall be filed on or before May 14, 1971. Ten copies

of the briefs and seven copies of the appendix of the parties may be filed in Xeroxed form. No extensions of time for the filing of the briefs or appendix will be granted.

The Clerk is directed to schedule this case for argument on the merits as soon after the briefs are filed as the business of the Court will permit.

Per Curiam

Opinion per curiam.
Dissenting opinion by Circuit Judge Tamm.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL

Appeal from the United States District Court
for the District of Columbia

Decided January 20, 1972

Mr. Dennis Dutterer, with whom *Mrs. Jean Camper Cahn* and *Mr. J. Kirkwood White* were on the brief, for appellants.

Mr. David P. Sutton, Assistant Corporation Counsel for District of Columbia, for District of Columbia appellees. *Messrs. C. Francis Murphy,* Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, also entered appearances for District of Columbia appellees.

Mr. John A. Terry, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, *Joseph M. Han-*

non, Assistant United States Attorney, *Fred M. Vinson, Jr.*, *William C. Cramer*, *Michael P. Bentzen*, *Sheldon S. Gilbert* and *James M. Robin* were on the brief, for Federal appellees.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by MACKINNON, *Circuit Judge*.

Dissenting opinion filed by WRIGHT, Circuit Judge, at p. 29.

MACKINNON, *Circuit Judge*: Plaintiff-appellants in this case are a class of persons composed of students at Jefferson Junior High School in the District of Columbia and their parents and guardians. Defendant-appellees are: (1) The Chairman and Members of the House of Representatives Committee on the District of Columbia[1]; (2) the Clerk, Staff Director, Counsel and a consultant to the Committee; (3) the Superintendent of Public Documents and the Public Printer, *i.e.*, the Government Printing Office; (4) the President and Members of the Board of Education of the District of Columbia; (5) the Superintendent of the Public Schools of the District of Columbia; (6) the Principal of Jefferson Junior High School; (7) a teacher at Jefferson Junior High School; (8) a

[1] Although the complaint initially named all of the Members of the House District Committee as defendants, we subsequently granted appellants' motion to sever Congressmen Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr., and to dismiss this appeal with respect to them. June 7, 1971. The stipulation upon which such dismissal was based, indicated that the above-named Congressmen oppose the distribution of the House Committee Report, so long as the names complained of remain therein, and that they would have voted against the publication thereof had they been given the opportunity to do so.

District of Columbia Police Officer acting as an investigator for the Committee; and (9) the United States of America.

Appellants, proceeding *in forma pauperis* and under fictitious names to preserve their anonymity, commenced this action in the District Court for damages, a declaratory judgment and for an injunction against further publication and distribution of a report of the House of Representatives Committee on the District of Columbia on the District of Columbia School System [2] unless 45

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[2] *Investigation and Study of the Public School System of the District of Columbia* (Report of the Committee on the District of Columbia, House of Representatives), *H.R. Rep. No.* 91-1681, 91st Cong., 2d Sess. (December 8, 1970). This report was prepared pursuant to a House Resolution, H. Res. 76, 91st Cong., 1st Sess. (February 5, 1969), which provides:

> *Resolved,* That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;
>
> (2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and
>
> (3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: *Provided,* That the Committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.
>
> For the purpose of carrying out this resolution the committee or subcommittee is authorized . . . to hold such hearings, and to require, by subpoena or otherwise,

pages thereof were altered to delete certain names of students. The pages in question contain copies of: (1) student absentee lists; (2) letters, memoranda, and other papers regarding student disciplinary problems; and (3) student test papers.[3] These documents, which include the true names and addresses of appellants, identify the students in contexts that are, at least partially, derogatory. Appellants contend, *inter alia*, that the disclosure, dissemination, and publication of the House Committee Report, so long as it contains the names of said students, violate their constitutional and common law right to privacy, constitute an impermissible bill of attainder, deny

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the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary . . .

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

* * * * * *

Counsel for appellants indicated at oral argument in the District Court that he does not contend that the House District Committee acted pursuant to an invalid legislative purpose in investigating the District of Columbia Public School System and publishing the Report (Tr. 23, 24, 27), but he does seek declaratory and injunctive relief against the Committee as well as others. Art. I, § 8, cl. 17, of the U.S. Constitution vests Congress with the power of "exclusive legislation" over the District of Columbia. *See* note 6, *infra*.

[3] This information was obtained voluntarily from District of Columbia school personnel by House District Committee investigators. Before the District Court below, appellants unsuccessfully sought an injunction against further disclosure of such "confidential information" by District of Columbia school officials.

them due process of law, violate the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), are devoid of any valid legislative purpose, and will cause severe damage to their mental and physical health, their reputations, and appellant-students' future careers. They also make a contention on appeal which was not raised below, namely, that the House Committee Report was published and distributed in violation of House rules.

The District Court denied appellants' motion for temporary relief and dismissed their complaint. It found that the House Committee Report had a "legitimate and proper legislative purpose," as demonstrated by the underlying enabling resolution,[4] and it held that it was without jurisdiction to grant the requested injunctive relief by reason of the doctrine of separation of powers. It further determined that since the acts of the Legislative Branch employees named as defendants were performed by them in the course of their employment, they were absolutely privileged under the doctrine of official immunity. The District of Columbia defendants were found to be protected by the doctrine that a public officer cannot be liable in money damages, even if he has acted negligently, so long as his act was discretionary. Finally, the District Court concluded that it lacked jurisdiction over any claim against the United States, since appellants had not exhausted their other remedies as required by 28 U.S.C. § 2675(a) (1970).[5] This appeal followed.

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[4] H.R. Res. 76, *supra* note 2.

[5] 28 U.S.C. § 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first

Appellants moved this court for summary reversal or an injunction pending appeal. On January 14, 1971, we issued an injunction to preserve the status quo until responses were filed. Such order did not enjoin the Members of the House District Committee or the United States, but it did prohibit the other defendant-appellees from any further publication and distribution of the House Committee Report, so long as it contained the names and addresses of pupils and parents. On March 11, 1971, this court denied appellants' motion for summary reversal, and appellees' motion for summary affirmance, and it modified the injunctive order of January 14, 1971, to permit the publication of names of students absent from school. It otherwise continued the injunction and ordered the case set for argument on an expedited basis.

The issues have now been briefed and argued, and we hold that the District Court's dismissal was proper. For the reasons set out below, we have concluded that the District Court was without jurisdiction with respect to the defendant-appellees. Therefore, we have not found it necessary to consider the merits of the constitutional, statutory, administrative, and common law claims which appellants have asserted.

I

Under Article I, Section 8 of the Constitution, Congress is provided with exclusive legislative authority over the

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presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of

District of Columbia.[6] This pervasive power is accompanied by inherently broad investigatory authority.

> Preliminary inquiry has from the earliest times been considered an essential of the legislative process. By it are to be determined both the advisability for and the content of legislation. So that even as to ordinary subjects, the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the [investigating body's legislative authorization.] That potentiality is the measure of the power of inquiry.

Barsky v. United States, 83 U.S.App.D.C. 127, 131, 167 F.2d 241, 245, *cert. denied,* 334 U.S. 843 (1948). *See Fields v. United States,* 82 U.S.App.D.C. 354, 164 F.2d 97 (1947), and authorities cited therein; *McGrain v. Daugherty,* 273 U.S. 135, 177-179 (1927). "The scope of the power of inquiry, in short, is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States,* 360 U.S. 109, 111 (1959). *See Watkins v. United States,* 354 U.S. 178, 187, 198 (1957).

Civil Procedure by third party complaint, cross-claim, or counterclaim.

Appellants have not challenged the District Court's dismissal of the suit against the United States on appeal.

[6] U.S. CONST. art. I, § 8 provides:

"The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, . . ." *See S.R.A., Inc. v. State of Minn.,* 327 U.S. 558 (1946); *Gudmundson v. Cardillio,* 75 U.S.App.D.C. 230, 126 F.2d 521 (1942); *La Forest v. Board of Commissioners of District of Columbia,* 67 App. D.C. 396, 92 F.2d 547, *cert. denied,* 302 U.S. 760 (1937).

The instant case concerns an investigation of the District of Columbia Public School System which was conducted on behalf of the Committee on the District of Columbia of the House of Representatives, by a Special Select Subcommittee of that House District Committee, under the authority of H.R. Res. 76, 91st Congress, 1st Session.[7] The study probed deeply into a great many problems of the District of Columbia School System. Included were: Administrative Problems, Board of Education of the District of Columbia, Crime in the Schools, D.C. School's Answer to Special Select Subcommittee Questions, Pornography, Revolutionary and other Inflammatory Materials, Damage to Property, Drug Abuse in the Schools, School Budget, Washington Teachers Union, Student Bussing, Student Suspension Policy, Schools without Walls, Open Class Rooms, Open Class Room Concept, Freedom School, Vocational Schools, Student Bill of Rights and Responsibilities and Teacher Comments. A portion of the study related to absenteeism, student discipline, and educational quality. On these matters, the 45 pages from 213-258 set forth for Jefferson Junior High School various absence sheets, lists of class cutters and certain reports and information concerning breaches of discipline and suspension problems. Also included were 19 pages of student test papers for a history examination taken from a fifth grade textbook but given to seventh graders. The average score was "F" and the report was submitted by the teacher to show the poor reading ability of most of her students.

At the conclusion of the investigation, the House Committee issued a 450-page Report, both for the benefit and use of Congress and for the information of the public. The material to which appellants object is only a small part of the entire Report. The Report in its

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[7] *See* note 2, *supra.*

entirety discloses a truly deplorable state of affairs in the public schools of the District of Columbia and obviously one of tremendous congressional concern.[8] Appellants do not challenge the propriety of the investigation or the issuance of the Report generally—*i.e.*, absent the use of their names—nor could they.[9] They only assert a statutory, common law, and constitutional right to anonymity. We need not discuss the merits of appellants' innovative claims, however, since we conclude that all of the defendant-appellees named in the complaint are immune from the suit brought against them.[10]

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[8] For the fiscal year ending June 30, 1970, Congress appropriated $140,386,000 for public education in the District of Columbia (83 Stat. 429). Further evidence of the vital interest of Congress in the current District school situation can be deduced from a letter of the President of the Board of Education appearing at pp. 16-19 of the Report which indicates that a grand total of $10,022,041 in additional appropriations will be needed "to create a safe learning environment for its students as determined by the school administration and the Board of Education."

[9] In light of the vast amount of tax dollars spent annually on public education in the District of Columbia, the great interest of the public in the effectiveness of the District schools is apparent. It must be emphasized that "[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees." *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (concurring opinion of Black, J.). "The informing function of Congress should be preferred even to its legislative function." *Watkins v. United States*, 354 U.S. 178, 200 & n.33 (1957). The fact that an educational institution was being investigated did not detract from Congress' general authority. *See Barenblatt v. United States*, 360 U.S. 109, 112, 129 (1959).

[10] Appellants have raised an issue, concerning alleged vio-

II

Article I, Section 6 of the Constitution provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." This provision, which was adopted by the Con-

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lations of House Rules, in their appeal brief which was never raised in the District Court. We dismiss this portion of the appeal on the ground that it was not properly asserted below. *Miller v. Avirom*, 127 U.S.App.D.C. 367, 384 F.2d 319 (1967); *United States v. Atkinson*, 297 U.S. 157, 159 (1936); *Johnson v. Reily*, 82 U.S.App.D.C. 6, 7, 160 F.2d 249, 250 (1947); *United States v. U. S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529 (1915); *Williams v. Union Pacific Ry. Co.*, 286 F.2d 50, 55 (9th Cir. 1960); *Burns v. United States*, 274 U.S. 328, 336 (1927). We do not believe that appellants have demonstrated the existence of any exceptional circumstances which might warrant divergence from this general principle. *Compare Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Morgan v. Garris*, 113 U.S.App.D.C. 222, 223, 307 F.2d 179, 180 (1962) (*en banc*). "This is not a mere technicality but is of substance in the administration of the business of the courts. Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved." *Johnson v. Reily, supra*, 82 U.S. App.D.C. at 7, 160 F.2d at 250.

A large part of appellants' argument, which is raised here for the first time, is devoted to the claim that they were entitled under Rule XI, 27(m) of the Rules of the House of Representatives, to have the evidence with respect to them received in executive session. Their argument further assumes that such procedure would have resulted in suppressing disclosure of the statements. However, an express determination by the "Committee" is required before it is necssary to convene an executive session of the Committee and no such determination was here made. Also, it is implicit from a reading of Rule XI, 27(o) that the taking of testimony in

stitutional Convention without debate or opposition,[11] found its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.[12] In light of this

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executive session does *not* automatically result in its suppression. It provides:

> "(o) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee."

Jefferson's Manual and Rules of the House of Representatives, p. 387, 92nd Cong. It thus appears that the Committee may still consent to the release of any such evidence or testimony and to its use in public sessions.

Appellants also contend that under the Rules of the House the Report was improperly released without allowing certain Congressmen to express a minority view. It does appear, however, that some of the Congressmen were orally informed. In any event, the delivery of the Report to the Clerk for printing and reference to the proper calendar under Cl. 2 of Rule XIII were reported in the Congressional Record for December 8, 1970 and the Report was on that date referred to the whole House on the State of the Union and ordered to be printed (116 CONG. REC. 40311). Such points of order must be raised by a member in the House of Representatives and unless done so in timely manner are waived. Appellants thus do not furnish a basis that justifies ordinary judicial intervention.

[11] *See* 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot ed. 1876); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 246 (M. Farrand rev. ed. 1966).

[12] *See* Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 3-16 (1968); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 961-966 (1951).

> It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess. [See Jefferson, Notes on the State of Virginia

history, the Supreme Court concluded in *United States v. Johnson*, 383 U.S. 169, 181 (1966), that the purpose of the Speech or Debate Clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary."

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[13] To accomplish this important objective, the Supreme Court has recognized the necessity for construing the Speech or Debate Clause protection in a broad fashion. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S. 169, 179-180 (1966). "[I]t would be a 'narrow view' to confine [its] protection . . . to words spoken in debate. *Committee reports*, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.' *Kilbourn v. Thompson, supra*, at 204." *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (emphasis supplied).[14]

(3rd Am. ed. 1801), 174-175.] For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison, The Federalist, No. XLVIII.

Tenney v. Brandhove, 341 U.S. 367, 375 (1951).

[13] 2 Works of James Wilson (Andrews ed. 1896) 38, as quoted in *Tenny v. Brandhove, supra*, 341 U.S. at 373.

[14] The Supreme Court has frequently cited the language of Chief Justice Parsons, of the Massachusetts Supreme Court, in *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), interpreting

The Speech or Debate Clause not only provides a defense on the merits, but it generally protects a legislator from the annoyance of having to devote his time and efforts to defending himself in court. *Powell* v. *McCormack, supra,* 395 U.S. at 502-503. *See Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967).[15] The only question which a trial

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the Massachusetts speech and debate clause, in support of its expansive interpretation rule:

> These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, *to the making of a written report,* and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. [emphasis supplied]

Tenney v. Brandhove, supra, 367 U.S. at 373-374; *Kilbourn v. Thompson, supra,* 103 U.S. at 203.

[15] The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck,* 6 Cranch

court should consider is "whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative acitvity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Since we believe that the activities of the defendant-members of the Committee on the District of Columbia of the House of Representatives "may fairly be deemed within [the Committee's] province," it is clear that the District Court properly dismissed the suit as to them. *Id.,* at 378. *See United States v. Doe,* —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 5-9 (1st Cir. January 7, 1972).

As has been noted, appellants concede the authority of the House District Committee to investigate and report to Congress on the District of Columbia Public School System. They have only questioned the propriety of that small portion of the Committee Report which uses their names in somewhat derogatory contexts. "That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox, but, in the world as it happens to be, is a realistic problem requiring a practical answer." *Barsky v. United States, supra,* 83 U.S.App.D.C. at 135, 167 F.2d at 249. It is apparent that the House District Committee was faced with a great dilemma. In its effort to expose the vexing problems which adversely affect the District of Columbia School System, with a view toward the alleviation of such problems to the benefit of all school children, the Committee obviously believed that some disclosure which might possibly injure a few pupils was necessary. While there may or may not be any substantial public interest in the test papers, discipline memoranda, or absentee lists

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87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California,* 283 U.S. 423, 455.

Tenney v. Brandhove, supra, 341 U.S. at 377.

themselves, the inclusion of such material in the Committee Report clearly increased its credibility. While some might consider that it was unnecessary to include the names, at a time such as this when "credibility gaps" are frequently mentioned, it was entirely reasonable for the House District Committee to include what it considered to be sufficient factual data to support its findings concerning a controversial and complex area. Delinquency in the District of Columbia Schools is such a problem and in connection with its investigation of the Student Suspension Policy, which it was investigating, Congress had a right to know the precise details of a few particular disciplinary problems involving the discipline of particular students for particular acts committed in the class rooms of the public schools of the District. All the details of such circumstances, including the names of the students involved and their acts were relevant and necessary for a full and proper consideration of the matter. Many of the instances of student delinquency which one hears daily are considered by many to be unbelievable. Others assert they are untrue. Under such circumstances the desire of the Committee to present specific evidence to support its findings is understandable. And the discretion is vested in Congress, not the courts. We must be careful to remember that under such circumstances, "every reasonable indulgence of legality must be accorded to the actions of [the] coordinate branch of our Government" by the judiciary. *Watkins* v. *United States, supra,* 354 U.S. at 204.[16]

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[16] "[I]t does not lie with this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes." *Hutcheson v. United States,* 369 U.S. 599, 619 (1962). Similarly, this court should not interpose its judgment for that of a congressional committee with respect to the amount of data required to bolster the credibility and effectiveness of a committee report.

What is really involved here is Congress functioning, as it must with respect to the District of Columbia, as a combination state legislature and education committee that is concerned with a grass roots problem. As with any local school board problem, this involves individuals, administrators, teachers, employees, parents, students and taxpayers. The Report recognizes this and to make its study complete and to give it the maximum credibility, the Report throughout, in hundreds of situations in addition to the students involved in disciplinary problems, has named the persons involved. The Report is replete with names of individuals, groups and organizations, many of which are discussed in connection with highly derogatory conduct. For instance, in reporting on the narcotics situation, names and incidents are recited of employees who were furnishing narcotics to drivers employed by the schools. H.R. Rep. No. 91-1681, 91st Cong., 2d Sess. 109-110 (1970). Appellants are not singled out. They are a minor part of the Report. However, it must be noted that the use of specific names throughout the Report does add considerably to its credibility in an area where reliability is necessary.

"Our function, at this point, is . . . not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field." *Barenblatt* v. *United States, supra,* 360 U.S. at 125. It is merely to determine whether the defendant-legislators were acting within the sphere of their legitimate activity when they collected the information in question and issued the House Committee Report in its present form. Since it is readily apparent that their actions were within the discretionary area of their constitutional authority, the defendant-Representatives are absolutely protected by the Speech or Debate Clause.

III

The legislative immunity provided by the Speech or Debate Clause is not limited to Congressmen, although the doctrine's protection "is less absolute . . . when applied to officers or employees of a legislative body, rather than to legislators themselves." *Dombrowski v. Eastland, supra,* 387 U.S. at 85. *See Tenney v. Brandhove, supra,* 341 U.S. at 378. Therefore, when congressional employees or officers are acting pursuant to valid [17] legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection. *See United States v. Doe,* —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 11-13 (1st Cir. January 7, 1972).

There is no contention by appellants that any of the Federal legislative employees named as defendants [18] were acting outside the sphere of their official duties. They merely performed the incidental functions which were necessary to insure the full accomplishment of the House District Committee's appropriate legislative objective. In this day of complex public problems, where assignment of

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[17] *Compare Kilbourn v. Thompson,* 103 U.S. 168 (1881); *Powell v. McCormack,* 395 U.S. 486 (1969); and *Bond v. Floyd,* 385 U.S. 116 (1966), where the underlying authorizations were invalid. Since the House District Committee's enabling resolution was clearly valid, as appellants have conceded, the holdings in these cases are inapposite to the present situation. The scope of the House District Committee's inquiry into the District of Columbia Public School System was properly limited and defined, and no compulsory process was utilized. Thus the rationale of *Watkins v. United States,* 354 U.S. 178 (1957), is not relevant here. *See Hutcheson v. United States,* 369 U.S. 599, 613 n.16, 616 (1962).

[18] These include the Clerk, Staff Director, Counsel, and consultant to the Committee, its investigator, the Superintendent of Public Documents and the Public Printer.

authority by legislators to legislative assistants is an absolute necessity if Congress is to be able to perform its constitutional functions, it would indeed be hollow to afford immunity to the Congressmen, but not to their assistants, for these aides might be hesitant to undertake the full performance of their lawful duties if they had to face the threat of possible lawsuits. Such an inconsistent result would impossibly hinder congressional activities, and effectively prevent the attainment of the objectives underlying the Speech or Debate Clause. We therefore must conclude that the suit against the Federal legislative employees [19] was properly dismissed due to their legislative immunity.

Although we could base our decision regarding the Federal legislative employees wholly on the protection afforded them by the Speech or Debate Clause, an additional consideration further demonstrates why the District Court properly refused to enjoin the publication and distribution of the House Committee Report by them. "If a court could say to the Congress [, and we might add to its authorized agents,] that it could or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either

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[19] Although it might be possible to extend the protection of the Speech or Debate Clause to cover the District of Columbia officials and employees who cooperated with the House District Committee's investigation, we need not reach this complex issue, due to the official immunity doctrine discussed in Part IV of this opinion. The parties have not argued this point, and we believe that its resolution is best left to another time. *Compare United States v. Doe*, —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 12-13 (1st Cir. January 7, 1972).

of the others." *Hearst v. Black,* 66 App.D.C. 313, 316-317, 87 F.2d 68, 71-72 (1936). In *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956), a decision of a three-judge court, Judge Edgerton speaking for himself and Judge Prettyman said:

> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
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> [Courts] have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

141 F. Supp. at 731-732. *See Hobson* v. *Tobriner,* 255 F. Supp. 295 (D.D.C. 1966).

In light of the assurance provided this court by the Federal appellees that the Chairman and Members of the House District Committee, as presently constituted in the 92d Congress, have no intention of seeking republication or further distribution of the House Committee Report,[20] we believe that the admonition provided by this court in *Cole v. McClellan,* 142 U.S.App.D.C. 24, 26, 439 F.2d 534, 536 (1970), is highly relevant:

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[20] Brief for Federal Appellants at 20 n.44.

> Judicial restraint is certainly proper in a case like the one before us, where the salient factors, taken in conjunction with each other, reveal (a) information delivered to the committee without objection or protest, (b) only the vaguest allegations of anticipated harm—a hypothetical speculation that at some indeterminate future occasion [appellants might suffer some injury] . . .; and (c) a lack of any showing of current activity by the committee staffs which constitute, as to the class of plaintiffs, an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized.

It is clear that the information in question was provided the legislative investigators by the District of Columbia school officials without objection or protest. In view of the fact that the Report had already been published and distributed before this action was instituted and that appellants have only asserted vague allegations of anticipated harm at some indefinable future time, we believe that the court below exercised appropriate judicial restraint in dismissing that part of appellants' complaint which sought the enjoining of the publication and dissemination of the House Committee Report. Any other determination would have caused needless friction between separate and independent departments of the Federal Government.

IV

We also decide that all of the District of Columbia defendant-appellees,[21] as well as the Federal legislative employees named in the complaint,[22] are protected from

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[21] These include the President and Members of the Board of Education, the Superintendent of the Public School System, and the Principal and teacher at Jefferson Junior High School.

[22] Although we concluded in Part II of this opinion that the Federal legislative employees are protected by the Speech or Debate Clause coverage, it is apparent that they are

liability [23] in the instant case by the doctrine of official immunity.

Unlike the constitutionally based Speech or Debate Clause protection, the law of privilege as a defense by governmental officials to civil suits has in large part been of judicial making. *Barr v. Matteo,* 360 U.S. 564, 569 (1959). The courts have recognized that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government." *Id.,* at

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also protected by the official immunity doctrine. Therefore, we have included them in the discussion pertaining to this area.

[23] In light of events which have transpired subsequent to the occurrences of which appellants have complained, concerning the District of Columbia officials, we do not believe that a decision on the injunctive relief sought against these defendant-appellees would be appropriate. On February 17, 1971, the Board of Education of the District of Columbia adopted a revised "Policy Statement Regarding Confidential Information" [see Appendix to this opinion], which appears to fully protect the rights of students, including appellant-pupils herein. There is no reason to think that this new policy will not be fully implemented by all school personnel, thus we are forced to conclude that there is no substantial threat of future injury to appellants which would necessitate a decision on their request for an injunction against the District of Columbia appellees. *Dulles v. Nathan,* 96 U.S.App.D.C. 190, 225 F.2d 29 (1955); *Spreckels Sugar Co. v. Wickard,* 75 U.S.App.D.C. 44, 131 F.2d 12 (1941). *See Golden v. Zwickler,* 394 U.S. 103 (1969); *Davis v. Ichord,* —— U.S.App.D.C. ——, 442 F.2d 1207 (1970); *Reiss v. Richardson,* —— U.S.App.D.C. ——, —— F.2d —— (No. 24,509, decided January 13, 1971).

571. The basic rationale for this doctrinal approach was excellently expressed by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

See Barsky v. United States, supra, 83 U.S.App.D.C. at 136, 167 F.2d at 250; *Spalding v. Vilas,* 161 U.S. 483, 498-499 (1896); *David v. Cohen,* 132 U.S.App.D.C. 333, 336, 407 F.2d 1268, 1271 (1969).

Official immunity has not been restricted to those in high government positions. "The privilege is not a badge or emolument of exalted office, but an expression of a

policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Barr v. Matteo, supra,* 360 U.S. at 573. *See Cooper v. O'Connor,* 66 App.D.C. 100, 107, 99 F.2d 135, 142 (1938); *Farr v. Valentine,* 38 App.D.C. 413, 420 (1912). Therefore, it is clear that this immunity doctrine is applicable with respect to both the District of Columbia and the Federal officials and employees with whom we are herein concerned.

It has been recognized that, to achieve the desired result, official immunity need not be applied to all actions engaged in by any governmental official. Immunity is only afforded in those instances where the official in question has performed a discretionary [24]—as opposed to a ministerial—act, within the scope of his official duties. *Kendall v. Stokes,* 44 U.S. (3 How.) 87, 98 (1845); *Cooper v. O'Connor, supra,* 66 App.D.C. at 103, 99 F.2d at 138; *Howard v. Lyons,* 360 U.S. 593 (1959). *Cf. Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 (1963). Thus a two-part analysis is required: (1) was the individual performing acts within the scope of his official duties, and (2) did the action undertaken require the exercise of discretion.

> It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (United States v. Birdsall,

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[24] "Where [discretion and judgment] are important, it is desirable that they operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight." *Elgin v. District of Columbia,* 119 U.S.App.D.C. 116, 119, 337 F.2d 152, 155 (1964).

> 233 U.S. 223, 230-231, . . .); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App.D.C. 126, 129, 18 F.2d 168, 171, . . . , certiorari denied, 275 U.S. 530, . . . It is sufficient if they are done by an officer "*in relation* to matters committed by law to his control or supervision." [Italics supplied] (Standard Nut Margarine Co. v. Mellon, 63 App.D.C. 339, 341, 72 F.2d 557, 559, certiorari denied, 293 U.S. 605, . . .); or that they have "*more or less connection with* the general matters committed by law to his control or supervision." [Italics supplied] (Spalding v. Vilas, 161 U.S. 483, 498, . . . ; and see Lang v. Wood, 67 App.D.C. 287, 288, 92 F.2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

Cooper v. *O'Connor, supra,* 66 App.D.C. at 104, 99 F.2d at 139. *See Barr v. Matteo, supra,* 360 U.S. at 575; *Gregoire v. Biddle, supra,* 177 F.2d at 581. All of the District of Columbia and Federal officials named as defendants have only engaged in official conduct in furtherance of a duly authorized congressional investigation. "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action." *Watkins* v. *United States, supra,* 354 U.S. at 187. This obligation is even more compelling where the citizen involved is a governmental official. *Pearson* v. *Wright,* 156 F. Supp. 136, 137 (D.D.C. 1957). *See Farr* v. *Valentine,* 38 App.D.C. 413, 419 (1912). Clearly the failure of an official to cooperate when matters under his control are being examined by a congressional committee would amount to malfeasance in office. *See Cooper v. O'Connor, supra,* 66 App.D.C. at 105, 99 F.d at 140. We must therefore conclude that all the complained of actions were undertaken by the defendant-officials within the scope of their official authority.

"The test of whether a challenged action is ministerial or non-ministerial is not the office *per se* or its height,

but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned." *David v. Cohen, supra,* 132 U.S.App.D.C. at 337, 407 F.2d at 1272. All of the pertinent actions undertaken by the officials in question here were non-ministerial. The District of Columbia school officials were required to exercise judgment in deciding what information they should provide the House District Committee investigators, who in turn, had to exercise clear discretion in determining what data to seek.[25] For these reasons, we are forced to conclude that the District Court properly dismissed the suit against the District of Columbia school officials,[26] as well as against the Federal officials.[27]

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[25] Appellants have in no way challenged these facts, nor could they.

[26] Unlike the situation which was present in *Spencer v. General Hospital of the District of Columbia,* 138 U.S. App.D.C. 48, 425 F.2d 479 (1969) (*en banc*), we believe that the present case is one where "wise considerations of public policy . . . suggest the undesirability of subjecting the [District of Columbia officials] to suit." 138 U.S. App.D.C. at 52, 425 F.2d at 483.

[27] Without intimating any opinion concerning the merits of appellants' substantive claims of official abuse of power, we should note that their remedy—if one is in fact called for—lies not with the courts, as we have indicated, but rather with Congress and the general public.

> "It is, of course, true," as was said in *McCray v. United States,* 195 U.S. 27, 55, "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom,

For the foregoing reasons, the decision of the District Court must be

Affirmed.

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after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

Barenblatt v. United States, 360 U.S. 109, 132-133 (1959). *See Tenney v. Brandhove, supra*, 341 U.S. at 378; *Barsky v. United States, supra*, 83 U.S.App.D.C. at 136, 167 F.2d at 250.

It appears from oral argument before the District Court that appellants elected to come immediately to court rather than to approach the School Board or the administration (Tr. 22). By so doing they may have given more publicity to the information they seek to suppress than would have otherwise resulted. This lawsuit thus may not serve the best interests of appellants. We have not explored the question as to whether appellants were required to request the relief they seek from defendants before bringing this lawsuit.

APPENDIX
POLICY STATEMENT REGARDING CONFIDENTIAL INQUIRIES

The Board of Education has determined the need to establish certain policies in order to prevent the disclosure of confidential information and reports regarding students and school personnel. It is the view of the Board that there are aspects of the professional relationships of school personnel with students, parents, and community which must be considered privileged and remain confidential.

The Board of Education in an effort to provide for the protection of the confidentiality of certain information related to school affairs and to respond appropriately to inquiries into the conduct of school affairs in the Public Schools of the District of Columbia establishes the following policies with regard to the release of such information:

1. Formal requests for confidential information regarding students and school personnel, shall be addressed to the Board of Education or its designee and the Superintendent or his designee for appropriate action.
2. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior written approval by the Superintendent and President of the Board of Education. The Superintendent and the Board of Education shall ensure that the confidentiality of privileged information is protected.
3. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior written approval by the Superintendent and President of the Board of Education. The Superintendent and

the Board of Education shall ensure that the confidentiality of privileged information is protected.

4. The Superintendent shall define with reasonable precision what is privileged information. The Board of Education may review and amend the Superintendent's definitions.
5. Privileged information can only be released as provided for by Chapter XVI, Section 6, Paragraph 1 of the Rules of the Board.

The foregoing shall not be applicable to legislative or judicial subpoenas issued to school personnel. However, upon receipt of such subpoena the employee, through his supervisor, shall as soon as possible contact either the Superintendent or his designee, who, in turn, may refer the matter to the Corporation Counsel for consideration.

Approved by the Board
February 17, 1971

WRIGHT, *Circuit Judge, dissenting*: The issues presented on this appeal do not raise questions of first impression. Indeed, the law in this area has long been the subject of intense judicial scrutiny and, insofar as this case is concerned, the relevant legal doctrines are now well settled. The majority, however, demonstrating a disheartening callousness to the legitimate interests of appellant children, rejects the teachings of experience and strains to revive outworn and repeatedly rejected notions of immunity to justify its result. I cannot and do not concur.

I

The first question presented for review is whether the District Court has jurisdiction of this action as it relates to the congressional appellees.[1] The majority asserts that publication of the report is absolutely immune to judicial scrutiny under the speech and debate clause of the Constitution.[2] Without reaching the more difficult question whether this clause protects members of Congress under these circumstances, *see Powell* v. *McCormack,* 395 U.S. 486, 506 (1969); *Stamler* v. *Willis,* 7 Cir., 415 F.2d 1365, 1368 (1969), *cert. denied,* 399 U.S. 929 (1970), I would hold that the seven congressional appellees who are not members of Congress[3] are not so protected.

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[1] Congressional appellees are (1) the chairman and members of the Committee on the District of Columbia of the House of Representatives; (2) the clerk, staff director, counsel and a consultant to the Committee; (3) the Superintendent of Public Documents and the Public Printer; and (4) the United States.

[2] Art. I, § 6, cl. 1 of the Constitution reads in pertinent part: "The Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place."

[3] These include appellees Clark, Gasque and Garber, who are respectively the clerk, staff director and counsel of

The doctrine that the speech and debate clause protects only members of Congress and does not extend to their agents and employees was first enunciated by the Supreme Court in *Kilbourn* v. *Thompson,* 103 U.S. (8 Otto) 168 (1880). In *Kilbourn* the plaintiff was arrested and imprisoned pursuant to a House resolution for refusing to testify at a committee hearing. The case arose in the context of an action for false imprisonment brought by Kilbourn against members of the committee and the sergeant-at-arms who executed the contempt warrant. The Court declared the resolution unconstitutional and, although dismissing the charges as to the congressmen, held that the sergeant-at-arms was not protected by the speech and debate clause and, further, that he was subject to liability for false imprisonment even though he had acted under orders from the House.

Any doubts as to the restricted scope of the speech and debate clause that may have remained after *Kilbourn* were surely erased by the Supreme Court's more recent decisions in *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack, supra.* In *Dombrowski* the Court held that the speech and debate clause did not cloak the chief counsel to the Senate Internal Security Subcommittee with absolute immunity in an action alleging violations of the plaintiff's Fourth Amendment rights.

Building upon *Kilbourn* and *Dombrowski,* the Court in *Powell* held that an action seeking to compel seating of a member of the House, restoration of seniority privileges, and award of back pay was properly maintainable against the employees of the House. In reaching this result, the Court noted that the purpose of legislative immunity "is

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the Committee; appellee Martin, the Committee investigator; appellee Little, the consultant to the Committee; and appellees King and Spence, the two named officials of the Government Printing Office.

not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." 395 U.S. at 505. Thus it is not enough simply to argue, as does the majority, that the scope of the immunity is in some way dependent upon the validity of the underlying authorization of the employees' conduct. In practical terms, this is a distinction without a difference, for it is now unmistakably clear that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." 395 U.S. at 504. *See Stamler* v. *Willis, supra,* 415 F.2d at 1368; *Hentoff* v. *Ichord,* D. D.C., 318 F.Supp. 1175, 1180 (1970). It is therefore apparent, contrary to the majority's conclusion, that the congressional appellees who are not members of Congress cannot assert a defense of privilege under the speech and debate clause as a bar to the instant suit.

Appellees further contend, however, that this suit is foreclosed by the doctrine of separation of powers. Our system of government is distinguished by the care that has been exercised in committing the legislative, executive and judicial functions to separate departments, and it has long been recognized that each department must avoid the temptation to encroach upon the powers and duties of the coordinate branches of government. *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Octjen* v. *Central Leather Co.,* 246 U.S. 297 (1918); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316, 409, 422 (1819). It is equally well established, however, that "such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms," *Watkins* v. *United States,* 354 U.S. 178, 204 (1957), and the mere possibility of conflict cannot justify avoidance of the judiciary's constitutional duty

to protect and ensure the rights of citizens. *Powell* v. *McCormack, supra,* 395 U.S. at 548-549; *Barenblatt* v. *United States,* 360 U.S. 109, 112 (1959). Indeed, the federal judiciary has consistently held that the separation of powers doctrine does not, of its own force, bar judicial review of congressional investigations. *See, e.g., Watkins* v. *United States, supra; United States* v. *Rumely,* 345 U.S. 41 (1953); *Kilbourn* v. *Thompson, supra; Stamler* v. *Willis, supra; Hentoff* v. *Ichord, supra,* 318 F.Supp. at 1181.[4]

The power of the judiciary to inquire into the affairs of the legislature was expressly set forth in *Kilbourn* v. *Thompson, supra,* when the Court quoted with approval from *Burnham* v. *Morrissey,* 14 Gray 226 (Mass. 1859):

> "'The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. * * * Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution * * * . * * *.'"

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[4] While these cases primarily concerned the limits of congressional power to acquire information, it is clear that the same principles should also be applied to issues arising out of congressional utilization of information previously obtained, for use of the information, as well as the means of its aequisition, can infringe constitutionally protected freedoms. *See Hentoff* v. *Ichord,* D. D.C., 318 F.Supp. 1175, 1181 (1970); *cf. Menard* v. *Mitchell,* 139 U.S.App.D.C. 113, 430 F.2d 486 (1970).

103 U.S. at 199. This power of review is not, of course, absolute. Thus in *Baker* v. *Carr*, 369 U.S. 186 (1962), the Supreme Court carefully delineated the permissible perimeters of the political question doctrine, a close cousin to the separation of powers concept. The Court declared that the doctrine would bar judicial scrutiny only where at least one of the following factors was present:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

369 U.S. at 217.

That the present controversy does not fall within the *Baker* v. *Carr* formulation is made clear in *Powell* v. *McCormack, supra,* and *Davis* v. *Ichord,* —— U.S.App. D.C. ——, 442 F.2d 1207 (1970). In *Powell* the Supreme Court applied the principles enunciated in *Baker* in a federal context, holding that the separation of powers doctrine did not bar judicial consideration of a challenge to the attempted exclusion of a congressman by the House of Representatives. After ruling that the right to exclude a duly elected member was not entrusted by the Constitution solely to Congress, 395 U.S. at 518-548, the Court held that since a judicial determination of the plaintiffs' rights required "no more than an interpretation of the Constitution," the controversy involved neither an initial policy determination of a kind clearly for nonjudicial discretion, nor a lack of respect due a coordinate branch

of government. 395 U.S. at 548-549. The Court concluded:

> "• • • Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. *See United States* v. *Brown*, 381 U.S. 437, 462 (1965); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)."

395 U.S. at 549. (Footnote omitted.)

Similarly, in *Davis* v. *Ichord, supra*, this court held that invocation of the separation of powers talisman would not foreclose judicial consideration of allegations that the House Internal Security Committee maintained dossiers which were used to inhibit plaintiffs' exercise of constitutional rights. Reiterating the teachings of *Baker* and *Powell*, we declared that judicial review of "an individual's claim of a constitutional right, and, we may add, an individual's claim of infringement of such a right, 'falls within the traditional role accorded courts to interpret the law,' " and does not in any sense violate the separation of powers doctrine. —— U.S.App.D.C. at ——, 442 F.2d at 1213 (quoting from *Powell* v. *McCormack, supra*, 395 U.S. at 548).

As in *Powell* and *Davis*, the claim asserted here involves a congressional infringement of appellants' rights under the Constitution. Thus judicial determination of this claim requires "no more than an interpretation of the Constitution," and since none of the *Baker* v. *Carr* requirements are satisfied,[5] this court is not barred by the separation of

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[5] See text at pp. 33-34 *supra*. *See also Powell* v. *McCormack*, 395 U.S. 486, 548-549 (1969).

powers doctrine. It is argued, however, that in spite of *Powell* and *Davis* we should refrain from deciding the instant case in order to avoid "needless friction" with a coordinate branch of government. In support of this contention, appellees cite this court's decisions in *Ansara* v. *Eastland*, —— U.S.App.D.C. ——, 442 F.2d 751 (1971), and *Cole* v. *McClellan*, 142 U.S.App.D.C. 24, 439 F.2d 534 (1970). These cases, however, are inapposite.

In *Cole* this court declined to enjoin the chairman, members and staff of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations from using information obtained from various colleges and universities through compulsory process. Although appellants in that case claimed that use of such information would violate their rights under the First Amendment, we held that judicial restraint was proper because

> "the salient factors [of the case], taken in conjunction with each other, reveal (a) information delivered to the committee without objection or protest, (b) only the vaguest allegations of anticipated harm * * *, and (c) a lack of any showing of current activity by the committee staffs which constitute, as to the class of plaintiffs, an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized."

142 U.S.App.D.C. at 26, 439 F.2d at 536. (Footnote omitted.) In the case presently before the court, however, appellants had no notice of the investigation or pending report and therefore had no opportunity to object or protest. Moreover, further publication of the confidential and degrading information involved in this case is likely to have a serious detrimental effect upon the psychological makeup and education of the named children, and there is no reason to believe the Committee staff will not reprint

and further distribute the report if given the opportunity to do so.[6]

Similarly, in *Ansara* v. *Eastland, supra,* the plaintiffs sought relief that would "precede and seek to relate to the conduct of a *future* legislative hearing." —— U.S.App. D.C. at ——, 442 F.2d at 753. (Emphasis added.) The court denied relief because

> "[t]he ongoing legislative process provides opportunity for presentation of plaintiffs' constitutional contentions. Moreover these contentions, which cannot be decided purely by reference to constitutional text, may be affected by the response within the legislative branch. We * * * note that the plaintiffs will have an opportunity to present their constitutional objections to the Subcommittee. * * *"

Ibid. The court then specifically distinguished the present situation, where appellants were not subpoenaed and had no opportunity to claim their constitutional protections at the time of the Committee's hearing.[7] *Ibid.* The legislative process with regard to this report is now complete. Appellants have no other forum in which to assert their constitutional rights; if the judiciary fails to act, these rights will be lost forever.

Finally, appellees and, somewhat surprisingly, the majority urge that *Methodist Federation for Social Action* v. *Eastland,* D. D.C., 141 F.Supp. 729 (1956), establishes

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[6] Although appellees assert that the members of the Committee have no desire to reprint or further distribute the report (brief of federal appellees at 20 n.44), they do not suggest that the other congressional appellees will refrain from further publication and distribution.

[7] Indeed, the court specifically distinguished *Hentoff* v. *Ichord, supra* note 4, which was substantially similar to the present case, because "there was no occasion for further legislative determination as to the matter in controversy." —— U.S.App.D.C. at —— n.3, 442 F.2d at 753 n.3.

the separation of powers doctrine as an immutable bar to judicial consideration of the instant case. In *Methodist Federation* a three-judge court dismissed a complaint seeking to enjoin publication and distribution of a government document where both the Public Printer and the Superintendent of Documents were named as defendants. In reaching this result the court apparently relied, in part, upon both the speech and debate clause and the doctrine of separation of powers, yet it failed even to discuss the implications of *Kilbourn*. Moreover, this decision has never been followed, and in view of the Supreme Court's subsequent decisions in *Baker, Powell* and *Dombrowski* and this court's decisions in *Davis, Ansara* and *Cole*, it obviously is not the law today. *See also Hentoff* v. *Ichord, supra*, 318 F.Supp. at 1180.

II

Thus, although the power of Congress to conduct investigations and to publish its conclusions is broad, it is not unlimited. As the Supreme Court noted in *Watkins* v. *United States, supra*:

> "• • • We cannot simply assume • • • that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy • • •."

354 U.S. at 198-199. Where congressional investigations and reports, no matter how laudable their objectives, encroach upon constitutionally protected liberties, an overriding interest of the state must affirmatively be shown. *See Barenblatt* v. *United States, supra*, 360 U.S. at 126-127.

A brief examination of the nature and scope of relief

sought by appellants may facilitate the search for the precise governmental interests at stake in the present controversy. The material included in the Committee report is not, as the majority contends, merely "somewhat derogatory." One disciplinary letter, for example, alleges that a specifically named child was "involved in the loss of fifty cents" and "invited a male substitute to have sexual relations with her gapping her legs open for enticement." [8] Similar letters accuse named children of disrespect, profanity, vandalism, assault and theft.[9] Of the 29 test papers published in the report, 21 bore failing grades.[10] Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity.[11] The question presented, then,

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[8] INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA, H.R. Rep. No. 91-1681, 91st Cong., 2d Sess., at 256 (Dec. 8, 1970).

[9] *Id.* at 253-258.

[10] *Id.* at 224-252.

[11] In terms of the injunction sought by appellants prohibiting any further publication or distribution of the report unless appellants' names and addresses are first deleted, I note that under the Freedom of Information Act, 5 U.S.C. § 552 (1970), where the right of the public to know is often in substantial conflict with an express or implied obligation of confidentiality, the solution has been precisely what appellants suggest here—to permit release of relevant documents and papers with deletion of identifying marks which might otherwise cause an invasion of privacy or breach of a confidential relationship with the individuals concerned. *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 138 U.S.App.D.C. 147, 149-150, 425

is simply whether the specific identification of particular schoolchildren in a derogatory context furthers any legitimate governmental interest. Appellees, however, fail even to suggest any such interest. Indeed, the invasion of the children's privacy and use of their names without their consent seems totally unrelated to the concededly proper legislative purpose of investigating the condition of the District of Columbia school system. The majority, however, contends that publication of the names may in some obscure way enhance the credibility of the report. But even if such an interest is valid, the balance here must be struck in favor of appellants.

The right of individuals to live their lives and maintain their personalities and affairs free from undue exposure to the outside world is a central premise of our constitutional and legal framework. *See* Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 260 (1966). In the time since Warren and Brandeis first enunciated the underpinnings of the right to privacy,[12] the right has matured in status and importance [13] until, in

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F.2d 578, 580-581 (1970); *Bristol Myers Co.* v. *F.T.C.*, 138 U.S.App.D.C. 22, 25-26, 424 F.2d 935, 938-939 (1970). Such a resolution is further buttressed by an analogy to those First Amendment cases requiring government, when it has available a variety of effective means to attain a given end, to choose the measure that least interferes with individual liberties. *See, e.g., United States* v. *Robel*, 389 U.S. 258 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *see also* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-293 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464 (1969).

[12] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[13] The right of privacy is now recognized in virtually every state, *see* W. PROSSER, LAW OF TORTS 636-637 (2d

1965, it was fully recognized as a core protection of the Bill of Rights. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The scope of the protection is broad, and it safeguards the general "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). Thus a primary thrust of the right is the freedom of the individual to control dissemination of information concerning his affairs.[14]

This protection is, of course, available to appellant schoolchildren, for the right to privacy, like all constitutional rights, is not "shed • • • at the schoolhouse gate." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969); *see, e.g., Breen* v. *Kahl*, 7 Cir., 419 F.2d 1034, 1036 (1969), *cert. denied*, 398 U.S. 937 (1970); *Sims* v. *Colfax Community School District*, S.D. Iowa, 307 F.Supp. 485, 487 (1970). Indeed, the inherent nature of the teacher-student relationship demands that any infringements on

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ed. 1955), and in the District of Columbia. *See Pearson* v. *Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, *cert. denied*, 395 U.S. 947 (1969); *Afro-American Publishing Co.* v. *Jaffe*, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966) (*en banc*); *Bernstein* v. *National Broadcasting Co.*, D. D.C., 129 F.Supp. 817 (1955), *affirmed*, 98 U.S.App.D.C. 112, 232 F.2d 369, *cert. denied*, 352 U.S. 945 (1956).

[14] The legal concept of privacy protects the individual not only against intrusions into his private affairs, but also against public disclosure of embarrassing private facts. *See Mau* v. *Rio Grande Oil, Inc.*, N.D. Cal., 28 F.Supp. 845, 846 (1939); *Melvin* v. *Reid*, 122 Cal.App. 285, 287, 297 P. 91, 92 (1931); Prosser, *Privacy*, 48 CAL. L. REV. 383, 392-398 (1960); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 977-984 (1964). In addition, it protects the individual where there has been publicity that has placed him in a false light. *See Peay* v. *Curtis Publishing Co.*, D. D.C., 78 F.Supp. 305 (1948); Prosser, *supra*, 48 CAL. L. REV. at 398-401.

the student's privacy be carefully scrutinzed. The student attends school under the command of the law and, as a result, suffers a considerable diminution of his freedom. *See* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 548 (1971). The educational system compels the student to reveal his abilities and personality to school authorities. As a result, the school system is, in many respects, a depository of personal and often potentially embarrassing information. As a collector of such information, particularly when obtained under the aura of compulsion, the school has a responsibility to the community to act in a careful and discriminating manner, always being cognizant of the harm that can result if the information is dispersed with reckless disregard for the student's interests.[15] Thus, although the initial compelled exposure of the student's private affairs, which in itself constitutes a severe intrusion upon his right to privacy, is clearly jus-

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[15] In numerous instances the legal system offers protection to persons compelled to reveal information to government. The federal government, for example, often prohibits public disclosure of confidential information where individuals are required to reveal such information to government agencies. *See, e.g.,* 2 FED. TAX REG. § 301.6103(a) (1964); 18 U.S.C. § 1905 (1970). With regard to the Census Act, which forbids public dissemination of information obtained by census takers, 13 U.S.C. §§ 8, 9, 214 (1970), the courts have upheld the constitutionality of compelled disclosure in part because the information revealed is kept strictly confidential. *See United States* v. *Little,* D. Del., 321 F.Supp. 388 (1971); *United States* v. *Rickenbacker,* S.D. N.Y., 197 F.Supp. 924 (1961).

In the area of school records, many states restrict both the type of records that can be obtained by nonschool personnel and the persons who can obtain them. A major qualification of such statutes is that the school records can be inspected for research purposes only if no pupil will be identified by name. *See, e.g.,* CAL. EDUC. CODE § 10751 (1969).

tified by the state's overriding interest in educating its citizens, any further encroachments on the student's privacy—through public dissemination of any matter revealed—must be strictly limited and must clearly be necessary to further important governmental interests.

The educational process is not, of course, grounded solely upon the compulsive nature of school attendance. It is dependent also upon its ability to foster a relationship of trust and confidence between teacher and pupil. At the heart of such a relationship is the guarantee that whatever is revealed to the teacher is disclosed in privacy. The student must have a reasonable expectation that his confidence will be preserved. *See* Jourard, *Some Psychological Aspects of Privacy,* 31 LAW & CONTEMP. PROB. 307, 311-312 (1966); *see also* Fried, *Privacy,* 77 YALE L. J. 475 (1968). Release of confidential information by school authorities, however, can serve only to destroy the fabric of this trust. And when this breach of trust is compounded, as is contemplated here, by a public disclosure of the failures and inadequacies of specifically named children, the inevitable consequence is the creation of an atmosphere of distrust, anxiety and fear that is itself destructive of the learning process. *See Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). As one learned educator has noted:

> "• • • [M]ost children in school are scared most of the time, many of them very scared. Like good soldiers, they control their fears, live with them, and adjust themselves to them. But the trouble is, and here is a vital difference between school and war, that the adjustments children make to their fears are almost wholly bad, destructive of their intelligence and capacity. The scared fighter may be the best fighter, but the scared learner is always a poor learner."

J. HOLT, HOW CHILDREN FAIL 75 (Dell ed. 1970).

The educational process has been described as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 493 (1954). If our schools are to achieve these goals, it is essential that they present an image of a fair society to these students. We must not compound the numerous negative faces our society already reveals to our youngest citizens. Yet treatment that degrades the student, invades his privacy, and frustrates his ability to gain self-respect must inevitably lead to disillusionment with the society that permits such unfairness and destroys the very foundation upon which he can prepare for a socially productive life.

Publication of this report without excision of the children's names would have consequences far beyond the classroom. These children are not public figures. They have in no way thrust themselves into the public spotlight and have done nothing voluntarily to attract public attention. Yet, once branded, the mark of Cain would follow them for the rest of their lives, seriously impairing their employment opportunities and future careers. A person should be allowed to live without the constant fear that previous indiscretions, particularly childhood indiscretions, will rise from the past to mark him anew. *See Melvin* v. *Reid*, 122 Cal.App. 285, 297 P. 91 (1931).

In light of these considerations,[16] and in the absence of

[16] Appellants urge further that publication of their names in a stigmatizing manner without notice or hearing violates the requirements of due process. *See Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). In addition, they contend that such publication constitutes an unconstitutional bill of attainder. *See Wisconsin* v. *Constantineau*, *supra*, 400 U.S. at 444 (Mr. Justice Black, dissenting); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866). However, I need not reach those questions here.

any overriding governmental interests, I would reverse the District Court's dismissal of this case for lack of jurisdiction and remand for a determination whether an injunction is necessary to prevent any further publication or distribution of this report unless and until the names and addresses of the appellant children are excised.

III

In addition to appellants' demand for an injunction against the congressional appellees, this case presents many other important and complex claims, all of which were summarily dismissed by the District Court. In ruling on a motion to dismiss, the court must assume all material allegations of the complaint to be true,[17] and the complaint should be dismissed only if it "appears that appellant[s] could 'prove no set of facts in support of [their] claim which would entitle [them] to relief.'"[18] Given these guidelines, I would hold that the District Court's characterization of appellants' claims as "frivolous" was improper and, therefore, that it erred in dismissing these claims without a hearing. Because of this summary dismissal, however, the record as it presently stands is so incomplete as to make it virtually impossible, as far as factual questions are concerned, for this court intelligently to pass on the merits of appellants' claims. Although the majority did not permit this obstacle to stand in its way, I would remand this case to the District Court for a full hearing on the merits.

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[17] *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967); *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482 (1947); 2A J. MOORE, FEDERAL PRACTICE ¶ 12.08 (1968).

[18] *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969). *See, e.g., Dollar* v. *Land*, 81 U.S.App.D.C. 28, 30, 154 F.2d 307, 309 (1946).

Appellants claim, for instance, that release of confidential information without deletion of the students' names renders the teacher and principal of Jefferson Junior High School liable in tort for violation of appellants' common law right of privacy.[19] In defense, appellees contend that they are protected by the doctrine of official immunity, alleging that release of such information was in furtherance of a "discretionary" rather than a "ministerial" function. *See Barr* v. *Matteo,* 360 U.S. 564 (1959); *David* v. *Cohen,* 132 U.S.App.D.C. 333, 407 F.2d 1268 (1969). Unlike the majority, I would not pass on that question, for it could not soundly be resolved on the sparse record presently before us. As we noted in *Carter* v. *Carlson,* —— U.S.App. D.C. ——, ——, 447 F.2d 358, 362 (1971), *cert. granted,* —— U.S. ——, 40 U.S. L. WEEK 3314 (January 10, 1972):

> "The distinction between discretionary and ministerial functions in this context must be drawn primarily with reference to its purpose. * * * Accordingly, in determining whether a particular government function falls within the scope of official immunity, it does not suffice to consider simply whether the officer has 'discretion' in the sense that he exercises judgment in choosing among alternative courses of action. The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct."

(Footnotes omitted.) Disdaining the teaching of *Carter,* however, the majority here simply concludes that the conduct of these appellees was discretionary in nature. I cannot join this conclusion, for the complex factual determinations required for intelligent resolution of this issue can

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[19] Invasion of privacy is soundly established as a common law tort in the District of Columbia. *See Pearson* v. *Dodd, supra* note 13; *Afro-American Publishing Co.* v. *Jaffe, supra* note 13; *Bernstein* v. *National Broadcasting Co., supra* note 13.

be made only after a full evidentiary hearing, and the majority's attempt to decide this question in the present vacuum exemplifies the futility of appellate fact finding.[20]

Moreover, the majority's disposition of this appeal fails even to consider several additional questions raised by appellants. For example, the majority simply ignores the possibility that monetary relief might lie against appellee Little, an independent consultant to the Committee who allegedly prepared the report for publication. It has never actually been decided whether Little was an "employee" of the House within the meaning of the official immunity doctrine; yet if he was not so "employed" the defense of privilege would be unavailable to him in appellants' common law suit for invasion of privacy. In a somewhat similar vein, a question exists as to the status of appellee Martin, a District of Columbia policeman who, while on loan to the United States Capitol Police, allegedly participated in transmittal of school records to the Committee. An inquiry should be made into the nature and propriety of this "loan," for if Martin's investigative activities were beyond

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[20] Similarly, the majority opinion leaves open the question whether these appellees—the teacher and principal—might be liable to appellants under 42 U.S.C. § 1983, Civil Rights Act of 1871 § 1, R.S. § 1979, 42 U.S.C. § 1983 (1964), for deprivation of their constitutionally protected right of privacy. It should be noted that the courts have consistently held that the District of Columbia is a "State or Territory" within the meaning of this statute. *See, e.g., Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Talbott* v. *Silver Bow County*, 139 U.S. 438 (1891); *Sewell* v. *Pegelow*, 4 Cir., 291 F.2d 196 (1961). Liability under the common law and under 42 U.S.C. § 1983 is not necessarily coextensive, and the scope of the official immunity doctrine seems narrow under the federal statute. *See, e.g., Carter* v. *Carlson*, —— U.S.App.D.C. ——, 447 F.2d 358 (1971), *cert. granted*, —— U.S. ——, 40 U.S. L. WEEK 3314 (Jan. 10, 1972); *McLaughlin* v. *Tilendis*, 7 Cir., 398 F.2d 287 (1968); *Jobson* v. *Henne*, 2 Cir., 355 F.2d 129 (1966).

the scope of his duties as an employee of the District of Columbia, but were not sufficient to render him an employee of the House, he would be precluded from asserting official immunity as a defense to appellants' common law action for damages.

Because of the District Court's summary dismissal of this case, we are left virtually in the dark on these and other [21] vital aspects of the instant controversy. An intelligent resolution of appellants' claims demands more information than can presently be gleaned from the record in its abbreviated state. Confronted with such a dilemma, the majority's unfortunate response is simply to usurp the fact finding function or, worse, to ignore the issues entirely. I can neither condone nor join such a decision. This case should be remanded to the District Court for preparation of a proper record so that it may test appellants' factual allegations and pass initially upon the legal issues involved.

I respectfully dissent.

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[21] For example, a question exists whether the District of Columbia might be vicariously liable to appellants for disclosure of confidential school information by its employees. Such liability might be predicated upon either common law principles or 42 U.S.C. § 1983. *See* note 20 *supra*. And although this issue is not resolved simply by finding that the employees themselves may assert a defense under the official immunity doctrine, *see Carter* v. *Carlson*, *supra* note 20, the majority fails even to consider this claim.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1971

Civil 56-71

[Filed Jan. 20, 1972, United States Court of Appeals for the District of Columbia Circuit /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and MacKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

Dated: January 20, 1972.

Opinion for the Court filed by MacKinnon, Circuit Judge.
Dissenting opinion filed by Circuit Judge Wright.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1971

Civil 56-71

[Filed Mar. 10, 1972, United States Court of Appeals for the District of Columbia Circuit /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Before: Wilbur K. Miller, Senior Circuit Judge; Wright and MacKinnon, Circuit Judges

ORDER

On consideration of appellants' motion for stay of mandate pending application for a writ of certiorari, of appellants' request for a continuation of injunction pending certiorari proceedings, and of the opposition of the Federal Appellees to the motion for continuation of injunction pending certiorari proceedings, it is

ORDERED by the Court that the Clerk is directed to stay the issuance of the opinion and certified copy of this Court's judgment, for a period of 30 days from the date of this order. This stay is subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, and it is

FURTHER ORDERED by the Court that the injunction previously entered by this Court on January 14, 1971, as modified on March 11, 1971, shall continue in effect pending the filing of a petition for writ of certiorari in the Supreme Court, and thereafter, until final action by the Supreme Court.

Per Curiam

Senior Circuit Judge Wilbur K. Miller would deny appellants' motion and request.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

JOHN DOE, ET AL., PETITIONERS

v.

JOHN L. MCMILLAN, ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

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